Supreme Court, U.S.
FILED

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

WESTINGHOUSE ELECTRIC CORPORATION, *et al.*,

Petitioners,

v.

RAYMOND FREIER, individually, as Administrator of the Estate of Rose Freier, deceased, and as surviving spouse of Rose Freier, *et al.*,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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239 pp

QUESTIONS PRESENTED

The 1986 Superfund Amendments and Reauthorization Act ("SARA") amendments to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") include a provision, 42 U.S.C. § 9658, that establishes a federal accrual date for certain actions "brought under State law for personal injury, or property damages." The federal accrual date is defined as "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages ... were caused or contributed to by the hazardous substance or pollutant or contaminant concerned."

The questions presented are:

1. Whether this federal accrual rule for state law tort claims violates the Commerce Clause and Tenth Amendment of the United States Constitution.

2. Whether under this objective discovery rule, and in the absence of diligent investigation by plaintiffs, accrual may be postponed or tolled as long as there is information questioning causation.

LIST OF THE PARTIES TO THIS PROCEEDING

The following parties are Petitioners in this proceeding:

WESTINGHOUSE ELECTRIC CORPORATION
GENERAL MOTORS CORPORATION
CURTISS-WRIGHT CORPORATION
OCCIDENTAL CHEMICAL CORPORATION
WASTE MANAGEMENT OF NEW YORK, INC.
BROWNING-FERRIS INDUSTRIES, INC.
ALLIED WASTE SYSTEMS, INC., formerly known as Laidlaw Waste Systems, Inc.
LITTON SYSTEMS, INC.
WARNER-LAMBERT COMPANY
FORD MOTOR COMPANY
NIAGARA MOHAWK POWER CORPORATION
NEW YORK STATE ELECTRIC & GAS CORPORATION
DRESSER INDUSTRIES, INC.
AMERICAN STANDARD INC.
CARBORUNDUM COMPANY
TRICO PRODUCTS CORPORATION
E. I. DUPONT DE NEMOURS & COMPANY

Each of the Petitioners was named as a defendant or a third party defendant in the complaints underlying this Petition and was an appellee/cross-appellant in the court of appeals.

The following parties are Respondents in this proceeding:

RAYMOND FREIER, individually, as Administrator of the Estate of Rose Freier, deceased, and as surviving spouse of Rose Freier,
ROSE FREIER, his spouse,

ARTHUR L. PHILLIPS, Administrator of the Estate of Leo Phillips, deceased, and Dorothy Phillips, as the surviving spouse of Leo Phillips,
TAB FUQUA,
CHARLOTTE MUCHA, individually, as Executrix of the Estate of Alfred G. Mucha, deceased, and as surviving spouse of Alfred Mucha,
JOHN FARINO, Administrator of the Estates of Mary Jane Farino and Robert Farino, deceased,
GRACE ASTOR, individually, and as surviving spouse of Evo T. Astor, deceased,
HARRY BASINSKI, SR.,
ELLEN BASINSKI, his spouse,
KATHY KAMINSKI, Administratrix of the Estate of Joseph Inzinna, deceased,
MARY YLMAR,
MARIE MANOLIS, Executrix of the Estate of Louis Manolis, deceased, and individually as the surviving spouse of Louis Manolis, legal representative of the Estate of Leo Ott, deceased, and Administratrix of Mary M. Sturm, deceased,
WILLIAM NIELSEN,
BETTY BARABASZ, Executrix of the Estate of George Pagels, deceased,
GLORIA PAGELS, individually as the surviving spouse of George Pagels,
JOSEPH GRANDILLO, Executor of the Estate of Stephen Grandillo, deceased,
SHIRLEY KUCZKA, Executrix of the Estate of Henry Kuczka, deceased, and individually as the surviving spouse of Henry Kuczka,
MARY ANN BOXHORN, Executrix of the Estates of Leo and Annabel Foisset, deceased,
EILEEN FOLTS, Administratrix of the Estate of Helen Hancock, deceased,
FRANKLIN MUELLER,

FLORA MUELLER, his spouse,
ROBERT S. FIELS,
DELORES FIELS, his spouse,
IRENE M. MARINO, legal representative of the Estate of Anthony J. Marino, deceased, individually as the surviving spouse of Anthony J. Marino,
NANCY FORMAN,
CARL P. FORMAN, SR., her spouse,
JOSEPH J. WIEDENBECK, JR., legal representative of the Estate of Isabelle A. Wiedenbeck and Joseph J. Wiedenbeck, Sr., deceased,
LINDA KISTKA, legal representative of the Estate of Nelson M. Hirsch, deceased,
NELLY ANTHONY, legal representative of the Estate of Diane Anthony, deceased,
ELEANOR JASINSKI, legal representative of the Estate of Leocadia Jasinski, deceased,
GEORGE SCHERRER, JR., legal representative of the Estate of George Scherrer, Sr., deceased,
MARIE SCHERRER, individually as the surviving spouse of George Scherrer, Sr., deceased,
VERONICA A. ZAWATSKI, legal representative of the Estate of Robert Zawatski, deceased, and individually as surviving spouse,
MICHAEL LAMANCUSO,
MARLENE LAMANCUSO, his spouse,
THOMAS SZYPLMAN, legal representative of the Estate of Victoria Szyplman, deceased,
GERALDINE DAVIES,
MORLEY P. DAVIES, her spouse,
KEVIN BATT, individually, as Administrator of the Estate of Charles W. Batt, deceased, and Executor of the Estate of Rose E. Batt, deceased,
PATRICIA BATT, his spouse,
DONNA MCKOWAN,
DONALD MCKOWAN, her spouse,

NORMAN WAGNER,
PATRICIA WAGNER, his spouse,
EILEEN EWERT, Administratrix of the Estate of EVO T. ASTOR, deceased,
THOMAS F. HEWNER, Public Administrator of the Estate of Lorraine E. Brzezicki, deceased,
LAWRENCE HEANEY, legal representative of the Estate of Gretchen Heaney, deceased
MARIE MARTZOLF, Executrix of the Estate of Robert Martzolf, deceased, and individually as surviving spouse,
JACQUELINE MONGIOVI, Executrix of the Estate of Vincent Mongiovi, deceased and individually as his surviving spouse.

Each of these Respondents were plaintiffs in separate lawsuits filed in the district court and were appellants and cross-appellees in the court of appeals.

The following parties were named defendants or third-party defendants in the district court, but are not petitioning this Court:

LANCASTER STONE PRODUCTS CORPORATION
BRYAN PFOHL
PAUL M. PFOHL
PFOHL BROTHERS
PFOHL ENTERPRISES
TOWN OF CHEEKTOWAGA
W.S. TYLER, INC.
HOWDEN FAN COMPANY, formerly known as Buffalo Forge Company.

The UNITED STATES OF AMERICA intervened in the court of appeals on the constitutional questions. Notice has been given to the United States of this Petition pursuant to Rule 29.4(b).

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STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court 29.6, Petitioners provide this Corporate Disclosure Statement for all nongovernmental corporate parties:

American Standard Inc.
American Standard Inc. is wholly owned by American Standard Companies Inc., a holding company.

Browning-Ferris Industries of New York, Inc.
Browning-Ferris Industries of New York, Inc. is a wholly owned subsidiary of Allied Waste Industries, Inc.

The Carborundum Company
The Carborundum Company is now known as Industrial Holdings, Corp. Industrial Holdings, Corp. is wholly owned by its parent company Lehman Brothers Holdings, Inc.

Curtiss-Wright Corporation
Curtiss-Wright Corporation has no parent corporation and no publicly held company owns more than 10% of its stock.

Dresser Industries, Inc.
DII Industries, LLC is a successor to Dresser Industries, Inc., and is a wholly owned subsidiary of Halliburton Company.

E.I. du Pont deNemours & Company
DuPont has no parent corporation and no publicly held company owns 10% or more of its stock.

Ford Motor Company
Ford Motor Company has no parent corporation and no publicly held company owns 10% or more of its stock.

General Motors Corporation
General Motors Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

Howden Fan Company
Howden Fan Company is now known as Howden Buffalo, Inc. Howden Buffalo, Inc. is a wholly owned subsidiary of Anderson Group, Inc.

Laidlaw Waste Systems, Inc.
Laidlaw Waste Systems, Inc. (now known as Allied Waste Systems, Inc.) is wholly owned by Allied Waste North America, Inc.

Lancaster Stone Products Corporation
Lancaster Stone Products, LLC, formerly known as Lancaster Stone Products Corporation, is a privately held entity and no publicly held company owns 10% or more of its stock or membership interest.

Litton Systems, Inc.
Litton Systems, Inc. (incorrectly sued as Litton Industries, Inc.), is a wholly owned subsidiary of Litton Industries, Inc. Litton Industries, Inc. is a wholly owned subsidiary of Northrop Grumman Corporation.

New York State Electric & Gas Corporation
New York State Electric & Gas Corporation is a wholly-owned subsidiary of RGS Energy Group, Inc., which is a wholly-owned subsidiary of Energy East Corporation.

Niagara Mohawk Power Corporation
Niagara Mohawk Power Corporation is a subsidiary of National Grid USA, whose parent is National Grid Group PLC.

Occidental Chemical Corporation
Occidental Chemical Corporation is a wholly owned subsidiary of Occidental Petroleum Corporation.

Trico Products Corporation
Trico Products Corporation is wholly owned by Stant Corporation.

Warner-Lambert Company
Warner-Lambert Company is a wholly owned subsidiary of Pfizer Inc.

Waste Management of New York, Inc.
Waste Management of New York, Inc. is now known as Waste Management of New Jersey, Inc.
Waste Management of New Jersey, Inc. is wholly owned by Waste Management Holdings, Inc.
Waste Management Holdings, Inc. is wholly owned by Waste Management, Inc.

Westinghouse Electric Corporation
Westinghouse Electric Corporation is a wholly owned subsidiary of Viacom Incorporated, successor to CBS Corporation.

W.S. Tyler, Inc.
By Stipulation entered September 12, 1996, this party was dismissed from all actions.

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STATEMENT PURSUANT TO RULE 29.4(b)

Because the proceedings draw into question the constitutionality of 42 U.S.C. § 9658, contained in an Act of Congress, and neither the United States nor any federal department, office, agency, officer or employee is a party, 28 U.S.C. § 2403(a) may apply.

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Second Circuit was entered on August 15, 2002, is reported at 303 F.3d 176 (2d Cir. 2002), and is reprinted in Appendix A to this petition ("Pet. App."). The opinions of the District Court for the Western District of New York, entered October 27, 1998 and September 22, 1999, are reported at 26 F. Supp. 2d 512 (W.D.N.Y. 1998) and 68 F. Supp. 2d 236 (W.D.N.Y. 1999), and are reprinted in Appendices B and C respectively.

STATEMENT OF JURISDICTION

The Second Circuit decision was entered on August 15, 2002. Petition for rehearing *en banc* was denied on October 8, 2002. See Appendix E. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). Notice pursuant to Rule 29.4(b) has been given to the United States Solicitor General.

CONSTITUTIONAL/STATUTORY PROVISIONS

Commerce Clause: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . ." U. S. Const., Art. 1, § 8.

Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U. S. Const., Amend. X.

Exception to State statutes: In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any

hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date [defined as "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages ... were caused or contributed to by the hazardous substance or pollutant or contaminant concerned"] in lieu of the date specified in such State statute. 42 U.S.C. § 9658 (a)-(b)(4)(A). The full text of 42 U.S.C. § 9658 is set forth at Appendix F.

STATEMENT OF THE CASE

From 1930 to 1969, the 120-acre Pfohl Brothers Landfill ("the Landfill" or "the Site") was openly operated just outside Buffalo, New York. Following its closure in 1969, nearby residents and others began to question the potential for health risks associated with the Site. In the 1980s, attention to potential health hazards from the Site increased. The government identified substances at the Site and conducted tests regarding their potential impact on the surrounding area. The Site was listed on the Federal National Priorities List and on New York State's first Registry of Inactive Hazardous Waste Sites and was classified as "a significant threat to the public health or environment - action required." The State fenced the Site and erected large, bright yellow signs warning: "DANGER HAZARDOUS WASTE AREA UNAUTHORIZED PERSONNEL KEEP OUT." The State Departments of Health ("DOH") and Environmental Conservation ("DEC") issued letters, updates and fact sheets regarding the Site, established a toll free information number and community liaisons, a public document repository, visited area residents, and conducted a health survey of residents and businesses. By the end of 1991 there had been

at least 28 public meetings, dozens of mailings and broadcast stories, over 100 newspaper articles, and numerous persons, including experts, had publicly asserted a connection between health risks, including cancers, and the Site.

Plaintiffs allege that they (or their decedents) lived, worked or recreated in the vicinity of the Site and were exposed to unspecified hazardous substances, causing various illnesses. Over half of the plaintiffs were personal representatives of individuals who had died as long ago as 1953. The injuries alleged by the living plaintiffs were diagnosed as early as 1963. It was not until many years later, however, in a series of lawsuits filed between January 10, 1995 and September 8, 1998, that plaintiffs commenced these diversity actions against the alleged owner/operators, generators or transporters of waste to the Site.

Plaintiffs acknowledge that they failed to inquire as to the possible cause of their injuries. Rather, although they had retained attorneys in the Spring of 1994, each and every plaintiff contends that he did not actually "discover" the alleged cause of his (or his decedent's) injuries and thus his claims did not accrue until December 1994 when his attorney and litigation expert advised him his injuries may be causally related to the Landfill. Admitting their claims were time-barred under any interpretation of New York law, plaintiffs asked the trial court to assign December 1994 as the accrual date for their claims. Plaintiffs alleged that this was the date the federal required commencement date statute ("FRCD"), 42 U.S.C. § 9658, would afford them under its "knew or reasonably should have known" standard.

Decisions Below

Defendants moved for summary judgment challenging the constitutionality of the FRCD on Commerce Clause and Tenth Amendment grounds and arguing that the FRCD's express language disallowed its application to plaintiffs'

claims. Defendants also argued that plaintiffs' claims were untimely even if the FRCD was applied, because under a "knew or reasonably should have known" standard, given the amount of available information regarding the Landfill and potential for health problems associated with the Site, plaintiffs' claims accrued as a matter of law *at the latest* by the end of 1991.

The district court upheld the FRCD on constitutional grounds and held that, despite its express application to "claims under state law for personal injury or property damage," the FRCD also applied to plaintiffs' wrongful death claims. Thus, the district court denied defendants' motion for dismissal of the wrongful death claims. Pet. App. B at 147a. In addressing accrual of plaintiffs' claims under the FRCD, the district court found, however, that "sufficient information was available prior to 1992" such that plaintiffs reasonably should have discovered "the possible existence of a claim based on their cancers," i.e. they should have discovered information suggesting a causal relationship between exposure and their injuries by the end of 1991 *at the latest*. Pet. App. C at 178a. The court held that under the FRCD rule the plaintiffs' personal injury claims accrued no later than the end of 1991, and, since the plaintiffs did not commence suit until in or after 1995, their claims were time-barred. Pet. App. C at 197a. This holding was then applied to the wrongful death claims, and they, too, were dismissed as untimely. See Amended Final Judgment, Appendix D.

Plaintiffs appealed the dismissal of their claims to the Second Circuit. Defendants cross-appealed challenging the constitutionality of the FRCD and the district court's application of the FRCD to wrongful death and survival claims. The Second Circuit upheld the FRCD on constitutional grounds and affirmed the district court's expansion of the FRCD to wrongful death claims. In interpreting the "knew or reasonably should have known"

accrual rule of the FRCD, the Second Circuit focused on what plaintiffs argued was information questioning a causal connection between the Landfill and their alleged injuries. The circuit court gave weight to plaintiffs' contention that, had they inquired, they would have been lulled into delaying suit by reassurances of non-parties that their injuries may not have been caused by the Landfill. The Second Circuit held that an issue of fact exists as to whether "plaintiffs reasonably should have known prior to the end of 1991 that the Landfill was the cause of the injuries." Pet. App. A at 61a. The decision cited no legal authority other than the FRCD for the standard it applied that permitted plaintiffs to delay accrual beyond the date when information is available to suggest a causal connection between exposure to the Landfill and plaintiffs' injuries, thus putting them on notice of their claims.

REASONS FOR GRANTING THE WRIT

I. THE FRCD EXCEEDS CONGRESS' POWER UNDER THE COMMERCE CLAUSE AND VIOLATES THE TENTH AMENDMENT.

The "federally required commencement date" sets a federal accrual date for state tort claims. This act of Congress is unconstitutional for two reasons. Engrafting federal accrual dates onto state law statutes of limitations governing state law claims constitutes regulation of non-economic and local activities, in violation of the Commerce Clause. Further, the imposition of a federal accrual rule for state law tort claims effectively changes state law and erases the line separating state and federal powers, in violation of the Tenth Amendment.

This Court should grant certiorari to halt this expansion of federal powers and invasion of state sovereignty, to correct a misinterpretation of this Court's prior constitutional rulings, and to clarify the limits of Congressional authority.

A. By Upholding The FRCD Under The Commerce Clause, The Second Circuit Gives Congress Expansive Power In Contravention of *United States v. Lopez* And Its Progeny.

The Commerce Clause of the United States Constitution protects inherently non-economic and local activity from the reach of Congress' regulatory powers. This Court has reaffirmed the proposition that "the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited" and has declined to expand the Commerce Clause's reach to activities that on their face have no relation to interstate commerce. *See Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001); *United States v. Lopez,* 514 U.S. 549, 551 (1995); *see also Jones v. United States*, 529 U.S. 848 (2000); *United States v. Morrison*, 529 U.S. 598 (2000).

Congress may regulate those activities that *substantially* affect interstate commerce.

> [T]he scope of the interstate commerce power "must be considered in light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized government."

Lopez, 514 U.S. at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

Because the setting of accrual dates for state law claims is non-economic, local in nature, and does not "substantially affect" interstate commerce, the FRCD is an impermissible exercise of Congress' Commerce Clause powers.

1. The FRCD Exceeds Commerce Clause Limits.

The activity regulated by the FRCD (setting a federal accrual date for select state law personal injury and property damage claims) "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one may define those terms." *Lopez*, 514 U.S. at 561. When it enacted the FRCD, Congress made no findings regarding any impact the accrual of state law torts claims would have on interstate commerce. A change in accrual rules for state law tort claims has no effect on CERCLA's purpose of remediating the sites of past disposal. The FRCD also lacks any jurisdictional element that limits its reach to a "discrete set of [activities] that additionally have an explicit connection with or effect on interstate commerce." *Id.* at 562. Instead, the FRCD applies to a wide range of state law claims, regardless of the parties involved, the amount in controversy, or the source of the alleged hazardous substances underlying the claim.

By definition, the FRCD applies only to *local* claims. 42 U.S.C. § 9658 (a) ("actions under state law for personal injury and property damages"). The activity regulated by the FRCD, accrual of those state law claims, is likewise "local." If it was not for the FRCD, state law would govern the accrual of these state law claims. CERCLA does not provide for private tort liability. For obvious reasons, states have traditionally managed these claims. This Court has cautioned that the federal government should not tread upon such areas. *See, e.g., Lopez*, 514 U.S. at 577 (Kennedy, concurring) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur..."); *Jones*, 529 U.S. at 858; *Solid Waste Agency*, 531 U.S. at 174.

Based on the non-economic and local nature of the activities at issue, this Court has held that the Commerce Clause does not permit federal regulation of guns in a school zone (*Lopez*), civil remedies for victims of domestic violence (*Morrison*), and the protection of migratory birds in intrastate waters (*Solid Waste Agency).* Any purported connection the accrual of state law claims might have to interstate commerce is even more remote than the connections rejected in *Lopez, Morrison,* and *Solid Waste Agency.*

2. Any Effect CERCLA As A Whole May Have On Interstate Commerce Does Not Justify The FRCD.

In evaluating whether the FRCD exceeds Congress' Commerce Clause powers, the Second Circuit does not examine the FRCD alone, but rather attempts to bootstrap the commercial effects of CERCLA onto the FRCD. Pet. App. A at 45a ("it is not necessary that each element of the regulatory scheme have a substantial connection with commerce when viewed in isolation"). However, reliance on the larger regulatory scheme to justify a particular aspect fails where, as here, the legislation at issue "is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561.

The FRCD is not an essential part of CERCLA. In fact, the FRCD concerns an activity otherwise untouched by CERCLA. Congress did not create a federal toxic tort cause of action in CERCLA or otherwise. *Exxon Corp. v. Hunt*, 475 U.S. 355, 359 (1986). CERCLA was enacted to facilitate the clean up of inactive hazardous waste sites, and the FRCD does not relate to CERCLA's primary focus. *Id.* It applies to tort claims that are not part of any CERCLA litigation and that have no relation to any CERCLA site. Congress commissioned a study in 1980 to examine the adequacy of existing common law and statutory tort

remedies, including "barriers to recovery posed by existing state statutes of limitations." 42 U.S.C. § 9651(e). The study group recommended that the state legislatures amend their state accrual rules to provide a discovery rule for hazardous substance exposure cases. Relevant portions of the study are reproduced at Appendix H. There was no recommendation that Congress enact any law, much less a *federally required* commencement date. Nonetheless, Congress included the FRCD in its SARA amendments to CERCLA in 1986. There is simply no basis for finding that CERCLA is dependent on regulation of accrual of state tort claims.

The Second Circuit suggests that the FRCD may provide incentive to parties to clean up inactive hazardous waste sites, thus furthering the goals of CERCLA. Pet. App. A at 49a-50a. There is no evidence, however, that the FRCD provides such an incentive or that any purported incentive is "essential" to the overall scheme of CERCLA. Using CERCLA as an example, the incentive to clean up CERCLA sites existed prior to the enactment of the FRCD and is based on the coercive powers of sections 106 and 107 of the statute. 42 U.S.C. §§ 9606-07. The notion that a postponement of the accrual date for potential toxic tort cases has an impact on the conduct of potentially responsible parties under CERCLA is hypothetical, as Congress made no such finding.

CERCLA's effect on interstate commerce provides no basis for concluding that the FRCD has the same effect. Federalizing accrual dates for state tort claims interferes with state regulation of local claims which has traditionally been left to the states, and, as such, "plows" new federal ground and represents a "sharp break" with prior law. *Cf. Lopez*, 514 U.S. at 563. The FRCD fails the Commerce Clause test and should be stricken as unconstitutional.

B. The FRCD Violates The Tenth Amendment By Impermissibly Impinging On State Sovereignty.

The Tenth Amendment to the United States Constitution provides that those powers not expressly granted to the federal government are reserved to the states. For a statute to be constitutional under the Tenth Amendment, Congress must first have had the authority to regulate the activity pursuant to one of the delegated powers under the Constitution. *New York v. United States,* 505 U.S. 144, 157 (1992). As set forth above, Congress does not have the power to regulate the accrual of state law claims, thus the Constitutional analysis need go no further.

Even if Congress had the power to regulate in this area, however, the method Congress chose for regulation of state tort claims impermissibly invades state sovereignty. *Id.* at 160. In enacting the FRCD, Congress focused on a single aspect of state tort law (accrual) and regulated that aspect in isolation. In so doing, Congress injected itself into the state legislative process and effectively changed state law. This method of regulation is impermissible under the Tenth Amendment. *See id.* (even if Congress has the power to regulate, it must do so in a way that does not otherwise violate the Tenth Amendment).

In *New York*, this Court acknowledged that "the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases." *Id.* at 155. As in *New York*, this case raises a question of "great importance and delicacy," namely whether federal law may, in isolation, regulate accrual dates for claims arising solely under state law. *Id.*

1. In Establishing A Federal Accrual Rule For State Tort Claims, Congress Has Commandeered State Legislative Process.

The constitutional significance of the FRCD is best revealed when the FRCD is viewed in context. Each state has established policies and principles governing accrual of the personal injury and property damages claims that arise under state law. These policies and principles represent each "State's judgment on the proper balance between policies of repose and the substantive policies of enforcement embodied in the state cause of action." *Wilson v. Garcia*, 471 U.S. 261, 263 (1985). For example, the New York State Legislature has enacted Civil Practice Law and Rule Section 214-c, which provides accrual rules for latent injury claims. This Court has recognized that "[i]n virtually all statutes of limitations, the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 464 (1975).

The sole purpose and effect of the "federally required commencement date" (FRCD) is to federally change state accrual law (and indeed it is entitled "Exception to State statutes"):

> [I]f the applicable limitations period for [an action under state law for personal injury or property damages] (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date *in lieu of the date specified in such State statute*. 42 U.S.C. § 9658(a)(1) (emphasis added).

Here, Congress did not create a federal cause of action, but rather limited the FRCD's application to state law claims. 42 U.S.C. § 9658(a)(1). Nor is the FRCD part of a larger

federal regulatory scheme to regulate tort claims or even accrual of tort claims. No other aspect of CERCLA or SARA regulates or addresses state law tort claims. In fact, personal injury claims are not within the scope of CERCLA liability, nor are personal injury damages recoverable under CERCLA. *See* 42 U.S.C. § 9607(a). The FRCD expressly provides that other aspects of state tort claims, including statutes of limitations, continue to be governed by state law. *See* 42 U.S.C. § 9658(a)(2) ("State law generally applicable"). Without a compelling federal interest and in the absence of a federal cause of action or federal regulatory scheme, Congress inserted itself into the state legislative process and changed state law to conform to federal dictates. In this way, the FRCD violates the Tenth Amendment.

This Court has long held that the Tenth Amendment prohibits the federal government from using state governments to accomplish federal regulatory purposes. In *New York*, this Court confirmed that Congress cannot compel the states to regulate in a particular field or in a particular way. *New York*, 505 U.S. at 161. Thus, federal action that "would 'commandeer' state governments into the service of federal regulatory purposes ... would for this reason be inconsistent with the Constitution's division of authority between federal and state governments." *Id.* at 175. Such action "has never been understood to lie within the authority conferred upon Congress by the Constitution." *Id.* at 176.

A federal law directing a state to regulate in a specific way "would be beyond the authority of Congress." *Id.* Even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, "it lacks the power directly to compel the States to require or prohibit those acts." *Id.* at 166, citing *FERC v. Mississippi*, 456 U.S. 742, 762-766 (1982), *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288-289 (1981), and *Lane County v. Oregon*, 74 U.S. (7 Wall.) at 76 (1868). These

principles were reaffirmed in *Printz v. United States,* 521 U.S. 898, 935 (1997), where this Court held "[i]t matters not whether policy-making is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty."

The FRCD cannot be reconciled with these principles. If, as established in *New York*, the Tenth Amendment prohibits Congress from forcing a state to change its own law, may Congress change the state law instead? The FRCD represents a back door attempt to accomplish what the Constitution and this Court have expressly forbidden.

By setting a federal accrual date for state law claims, the FRCD appropriates the state legislative process in favor of *federal* regulation of a *state* regulatory scheme. While the means by which the FRCD accomplishes this appropriation are not identical to those employed in *New York*, the end result is the same and similarly violative of the Tenth Amendment. Under the FRCD, states are prevented from giving legal effect to the accrual laws they have enacted and are instead forced to accept Congress' change in state law. Never before has this Court, under the Tenth Amendment, or otherwise, endorsed the idea that federal law can nullify a state's ability to establish accrual rules for its own claims. Just like the statute at issue in *New York*, under the FRCD, states have no choice but to regulate in accordance with the federal mandate. Any state regulation conflicting with the federal mandate is rendered null and void by the FRCD.

The method employed by Congress in enacting the FRCD represents a sharp break with established methods for creating and enforcing federal rights. Congress enacted an accrual rule for state tort claims in the absence of a federal cause of action, and without a compelling federal interest or federal regulatory scheme intended to occupy the field.

CERCLA was not enacted to compensate private parties for harm resulting from discharges of hazardous substances. *See Exxon*, 475 U.S. at 359 (CERCLA "seeks to facilitate government cleanup").

Relying on the Supremacy Clause, the Second Circuit rejects the Tenth Amendment challenge, countering that the FRCD "requires no action by a state's legislative or executive officials, but only the application of federal law by the courts to recognize the Federal Commencement Date of a state-law claim . . ." Pet. App. A at 51a-52a. This reliance, however, is misplaced. A valid federal law, enacted pursuant to Congress' enumerated powers, will pre-empt contrary state law. When that federal law lacks a constitutional foundation and violates the sovereignty of state law, however, the Supremacy Clause cannot save it. Thus, any suggestion that the FRCD is a valid exercise of pre-emption misses the mark. The Supreme Court succinctly rejected this same Supremacy Clause argument in *Printz*, 521 U.S. at 924-25:

> The Supremacy Clause ... makes "Law of the Land" only "Laws of the United States which shall be made in Pursuance [of the Constitution]" Art. VI, cl. 2, so the Supremacy Clause merely brings us back to the question discussed earlier, whether laws conscripting state officers violate state sovereignty and are thus not in accord with the Constitution.

Moreover, the FRCD is *not*, as the Second Circuit posits, an instruction to a state *court* to apply federal law, but a usurpation of the state *legislative* process by changing state law. As previously noted by the Second Circuit, since the FRCD appears to (and purports to) "change state law" it is of "questionable constitutionality." *ABB Indus. Sys. v. Prime Tech.*, 120 F.3d 351, 360 n.5 (2d Cir. 1997).

In enacting the FRCD, Congress manifested no intent to exclusively occupy the field of accrual of state tort claims,

and the FRCD does not do so. Congress established this federally required accrual rule in the absence of a comprehensive federal regulatory scheme. The FRCD constitutes random federal interference on an unsystematic basis, and, as such, violates the Tenth Amendment.

2. Application Of The FRCD To Wrongful Death Claims Raises Additional Tenth Amendment Concerns.

The Second Circuit materially alters the definition of a personal injury action under state law by declaring that the FRCD's limited application to "personal injury" claims may include wrongful death claims. Pet. App. A at 38a ("[I]n light of the statutory scheme as a whole, [the FRCD] was meant to encompass" wrongful death claims).[1] There is no legislative history or other suggestion that Congress intended this result. Applying the FRCD to wrongful death claims further abrogates the Tenth Amendment.

A personal injury claim is separate and distinct from a claim for wrongful death and each has its own statute of limitation and accrual rules. In virtually every state, including New York where these claims arose, wrongful death claims are creatures of statute, unrecognized at common law. *See The Harrisburg*, 119 U.S. 199, 214 (1886); see also chart of state wrongful death statutes, Appendix G. Indeed, federal law recognizes the fundamental distinction between wrongful death and personal injury claims. *See, e.g., Sea-Land Servs. v. Gaudet*, 414 U.S. 573, 578 (1974) ("[A] single tortious act might result in *two*

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[1] If Congress "meant" the FRCD to include wrongful death actions it would have done so separately from personal injury claims as it did in the Federal Tort Claims Act, 28 U.S.C. § 2672; the Federal Employers Liability Act, 45 U.S.C. § 51; and Jones Act, 46 U.S.C. § 688.

distinct, though related harms, giving rise to *two separate causes of action*...[a wrongful death action is] independent of any action the decedent may have had for his own personal injuries.") (emphasis added).

In most states, including New York, a wrongful death claim accrues on the date of death, without exception. *See, e.g.*, NY EPTL § 5-4.1. Typically, the discovery rule does not apply to such claims. *See* Joseph M. McLaughlin, *Practice Commentaries to CPLR 214-c* at 638 (McKinney's 1990); *New York Civil Practice - Estates, Powers and Trusts Law* ¶ 5-4.1[13] at 5-486 (Matthew Bender 1996). Under the rule established by the Second Circuit, a wrongful death claim may not accrue until decades after death when a personal representative "discovers" the cause of the decedent's injury.[2] In this way, the Second Circuit's decision further substantially changes state law.

The Second Circuit disregards the balance that states have struck in enacting wrongful death statutes. Such federal interference with state statutory schemes has never been sanctioned by this Court.

C. Certiorari Is Warranted To Address The Federalism Concerns Raised By The FRCD.

The FRCD "forecloses the States from experimenting and exercising their own judgment in an area to which states lay claim by right of history and expertise[.]" *Lopez*, 514 U.S. at 583 (Kennedy, concurring). The Constitution requires a distinction between what is truly national and what is truly

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[2] For example, Eleanor Jasinski brought a wrongful death claim on behalf of the estate of Leocadia Jasinski, who died in 1953. Under New York's wrongful death statute the time to bring this claim expired in 1955. Plaintiff, however, did not commence suit until 1997, some 42 years later.

local. *See id.* at 567. The Court should reject this change in state law and injection of a federal standard of accrual (indeed a "federally required commencement date") into state tort claims, thus evading the boundaries between state and federal authority and effectively changing state law. *See Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front").

II. THE COURT SHOULD HALT THE EXPANSION OF THE WELL-ESTABLISHED DISCOVERY RULE OF ACCRUAL.

In reinstating plaintiffs' decades-old claims, the Second Circuit expands the well-established discovery rule of accrual and ignores the proper balancing of interests reflected in accrual of state tort claims. The Second Circuit would allow accrual to be indefinitely delayed based on a standard that rewards meritless cases and that can never be met absent proof of causation-in-fact. Even if knowledge of a cause of action would otherwise be imputed to a plaintiff (i.e. even if a reasonably diligent inquiry would lead a plaintiff to information suggesting injury and causation), the court would delay accrual until such time as counsel and a purported expert urge plaintiff to commence a lawsuit. Even where a plaintiff admittedly fails to inquire about a possible causal connection between claimed exposure and known injury, the Second Circuit would delay accrual if plaintiff points to conflicting opinions as to causation (opinions he was never aware existed at the time he claims they extended accrual).

Relieving a plaintiff of his duty to inquire and then permitting him to delay accrual based on what he believes inquiry might have revealed rewards the dilatory and makes plaintiff the sole arbiter of accrual. This expansion of the "knew or reasonably should have known" discovery rule is wholly unwarranted and should be halted.

A. The FRCD Does Not Permit Tolling Or Extension Of Accrual Until Such Time As A Plaintiff's Claim Is No Longer The Subject Of Controversy.

Under a discovery rule of accrual such as the FRCD, a claim accrues when a plaintiff knows, or with reasonable diligence should have known, of a potential causal connection between his injury and its alleged source. 42 U.S.C. § 9658; *United States v. Kubrick*, 444 U.S. 111, 117 (1979). This rule is an objective one and is not to be subjectively applied. *Urie v. Thompson*, 337 U.S. 163, 170-71 (1949); *Hughes v. Vanderbilt Univ.*, 215 F.3d 543, 548 (6th Cir. 2000) (citations omitted); *Nemmers v. United States*, 795 F.2d 628, 631 (7th Cir. 1986) (employing objective standard to evaluate question of when diligent plaintiff would have discovered cause).

Discovery rules of accrual are intended to balance the notion of repose with the interests of plaintiffs in having an adequate amount of time to discover potential claims. Repose statutes are designed to apportion the consequences of the passage of time between plaintiffs and defendants and to preclude litigation of stale claims. *Kubrick*, 444 U.S. at 117; *Rotella v. Wood*, 528 U.S. 549, 555 (2000) (rejecting expansive discovery rule for RICO cases because it would allow "litigation ... at odds with the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities").

Accrual marks the beginning of the period for plaintiff to commence his lawsuit. Plaintiff then has the entire statutory period to determine whether to commence suit, and more time following commencement of his action to discover and develop his proof for trial. Accrual is simply the first step in this ongoing process. It is incumbent on plaintiff to

determine if there is a legal basis for suit, and he must file suit within the limitations period.

Accrual rules for tort claims have evolved to reflect the changing nature of such claims. Initially accrual was marked by the accident date (or in the case of toxic cases, exposure date). Then, as latent injury claims evolved, accrual rules in many states were modified to provide that claims would not accrue until a party "discovers" he was injured by an alleged exposure. Today, some states (and now the FRCD) set accrual as the date a party can fairly be charged with knowledge of his injury and a potential causal relationship between that injury and an exposure.

Since a "discovery" rule necessarily extends accrual, it interferes with repose. Thus, since its inception, courts have staunchly restricted the application of the discovery rule to "blameless ignorance." *Urie*, 337 U.S. at 170; *Kubrick*, 444 U.S. at 121; *Barrett v. United States*, 689 F.2d 324, 327 (2d Cir. 1982), *cert. denied,* 462 U.S. 324 (1982). For purposes of the accrual analysis, a plaintiff will be charged, as a matter of law, with knowledge of all facts he reasonably could have discovered by making a diligent investigation. *Id.* A plaintiff, "armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community. To excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims. . ." *Kubrick*, 444 U.S. at 123. This is particularly true in this case where there was no evidence submitted by plaintiffs that they "could not have" discovered a causal connection due to lack of medical or scientific information. In fact, plaintiffs' expert offered his opinion based solely on science and facts that were otherwise known and available no later than 1991.

Moreover, given that the discovery rule may extend accrual beyond exposure and discovery of injury, *exceptions* to the rule are *extremely limited*. In the absence of fraudulent concealment by defendant, plaintiffs are not permitted to rely on subjective reasons to excuse their failure to assert their claims in a timely fashion. *See Rotella*, 528 U.S. at 561 ("The virtue of relying on equitable tolling lies in the very nature of such tolling as the exception, not the rule"); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 192-93 (1997) (noting distinctions between different equitable devices); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990), *cert. denied*, 501 U.S. 1261 (1991) (same). Absent a legal justification for tolling the statute of limitations (or otherwise estopping defendants from relying on these limitations), there is no basis to postpone accrual. *See id.* To hold that plaintiffs may raise a genuine issue of material fact as to accrual based on conflicting evidence as to causation, results in the exception becoming the rule and results in an issue of fact for every statute of limitations determination.

Thus, in *Kubrick* this Court held that accrual of a medical malpractice claim under the Federal Tort Claims Act is not delayed until such time as plaintiff "discovers" a violation of his legal rights. 444 U.S. at 358-59. The *Kubrick* Court explicitly rejected the plaintiff's subjective excuses that would have extended accrual until discovery that his medical treatment constituted negligence. *Id.* at 124, 127-28. In particular, *Kubrick* rejected plaintiff's excuses that (i) "experts" were divided on the crucial issues of negligence; (ii) the issues were of "technical complexity"; (iii) plaintiff relied on assurances by the Veteran's Administration that he had not been wronged; and (iv) plaintiff received bad advice from his doctor. *Id.* *Kubrick* stressed that "determining negligence ... is often complicated and hotly disputed, so much so that judge or jury must decide the issue after listening to a barrage of conflicting expert testimony." *Id.* at

124 (citations omitted). This, however, is no basis for extending accrual. *See id.* at 124, 127-28.

The reasons for rejecting these excuses have equal application whether such excuses (i.e., bad advice, more than one potential cause, conflicting experts, or technical complexity) are offered to explain a plaintiff's failure to "discover" a cause of action in negligence (duty, breach of duty, causation) or failure to discover a potential cause of the injury under the FRCD discovery rule. Such excuses have no place in the evaluation of accrual.

The objective discovery rule may be harsh and may bar otherwise valid claims, yet the plaintiff is obligated to enforce his rights within the limitations period. *Kubrick*, 444 U.S. at 124-25; *see also Gould v. U.S. Dept. of Health & Human Services*, 905 F.2d 738, 747 (4th Cir. 1990), *cert. denied*, 498 U.S. 1025 (1991) ("We are not unmindful that a strict adherence to the requirements of the statute of limitations provision ... often works a substantial hardship on plaintiffs and may have a harsh impact on a party innocent of any impropriety. Statutes of limitations often make it impossible to enforce what are otherwise valid claims. Although we recognize the hardship resulting to the plaintiffs in this case, we have no choice but to apply the law as written"); *accord Barren v. United States*, 839 F.2d 987, 992 (3rd Cir. 1988), *cert. denied*, 488 U.S. 827 (1988).

B. Certiorari Should Be Granted To Resolve The Conflict Among The Circuits As To Whether "Subjective Factors" May Extend Accrual.

While the discovery rule is well-established, courts have not been uniform in their application of the rule. Despite the guidance provided in 1979 by this Court in *Kubrick* and despite the well-established policies underlying accrual and repose statutes, circuit courts are divided on whether excuses

or other subjective factors may delay accrual in a discovery rule analysis.

Many courts determining accrual under a discovery rule have rejected excuses or subjective factors when offered by plaintiffs to extend or delay accrual. For example, in *Gonzalez v. United States*, 284 F.3d 281, 287 (1st Cir. 2002), the First Circuit held that a claim accrues under the "knew or reasonably should have known" standard when plaintiff has notice of *likely cause*, actual or imputed. *Gonzalez* rejected the argument that plaintiff's claims did not accrue until she obtained an expert report. *Id.* at 290-91; *see also Fidler v. Eastman Kodak Co.*, 714 F.2d 192, 199 (1st Cir. 1983) (When a plaintiff is "on notice" of a potential claim, "his cause of action is no longer inherently unknowable" – rejecting argument that action did not accrue until plaintiff found attorney and doctor who would agree with her assessment of her case). "[O]nce the plaintiff is on notice of the injury and its potential cause, the limitations period begins to run, regardless of whether she makes inquiries and continues to run even if she has been incorrectly advised." *Gonzalez*, 284 F.3d at 290 n.10 (citing *Kubrick*, 444 U.S. at 124).

In *Moore v. CSX Transportation, Inc.*, 1992 U.S. App. LEXIS 6490, *6 (4th Cir. 1992), the Fourth Circuit deemed "without merit" plaintiff's contention that he "could not possibly know the origin of his hearing loss until such cause could be properly determined by expert medical opinion." *See also Lampert v. Norfolk & Western*, 1992 U.S. App. LEXIS 13516, *3-4 (4th Cir. 1992) (rejecting plaintiff's reliance on subjective factors or excuses to delay accrual).

The Sixth Circuit in *Wells v. Norfolk Southern*, 1997 U.S. App. LEXIS 4347, *8-9 (6th Cir. 1997), rejected plaintiff's arguments that he should not be held to the discovery rule because he was an uneducated worker and merely thought his

hearing loss was related to getting older and his employer misled him about the cause of his loss. *See also Hughes,* 215 F.3d at 548 (plaintiff may be charged with constructive knowledge even where she is unaware of pervasive media attention; the relevant inquiry "is an objective one").

The Seventh Circuit firmly rejects the idea that when a plaintiff suspects several causes, accrual is delayed until the governing, or even most probable, cause is known. *See Fries v. Chicago & Northwestern Transp. Co.,* 909 F.2d 1092, 1095-96 (7th Cir. 1990) ("The Court held in *Kubrick* that a plaintiff must act diligently...upon experiencing symptoms a plaintiff has a duty to investigate both the injury and any suspect cause"); *see also Tolston v. AMTRAK,* 102 F.3d 863, 865-66 (7th Cir. 1996) (claim accrues even if it is difficult to differentiate among various potential causes); *Nemmers,* 795 F.2d at 632 ("*Kubrick* said that the statute runs even if the plaintiff, because of bad advice, is dissuaded from filing suit.").

The Tenth Circuit has reaffirmed the relevance of *Kubrick* in *Plaza Speedway, Inc. v. United States,* 311 F.3d 1262 (10th Cir. 2002). In reversing judgment for plaintiffs in a toxic exposure case, the court held that plaintiffs' claim accrued when they were notified of the presence of contaminants in their well at which time "they had reason to suspect the source might have been the neighboring property." There was no basis for plaintiffs' claim that accrual under a discovery rule must be determined by the trier of fact or that accrual should be delayed until somebody advised them of a "definite" as opposed to a "possible" cause. *Id. See also Arvayo v. United States,* 766 F.2d 1416, 1422-23 (10th Cir. 1985) (criticizing the district court for applying a subjective standard for accrual and for imposing a duty to disclose on doctors rather than a duty to inquire on plaintiffs; plaintiffs' claim, filed after they fortuitously learned from their attorney of a causal connection between the delay in diagnosis and

brain damage, was untimely because it was brought outside the Federal Tort Claims Act's two year statute of limitations).

Other circuits, however, including the Fifth, Eighth, Ninth, and Eleventh, have adopted an expansive view of the discovery rule and permit reliance on subjective factors to extend accrual.

In *Dubose v. Kansas City Southern Railway Co.*, 729 F.2d 1026, 1031 (5th Cir.), *cert. denied,* 469 U.S. 854 (1984), the Fifth Circuit delayed accrual based on "factors including how many possible causes exist and whether medical advice suggests an erroneous causal connection or otherwise lays to rest a plaintiff's suspicion regarding what caused his injury."

The Eighth Circuit in *Brazzell v. United States*, 788 F.2d 1352, 1356 (8th Cir. 1986), found that the district court "was correct in disregarding appellee's suspicions about the cause of her injuries" due to reliance on incorrect medical advice. *See also Osborn v. United States*, 918 F.2d 724, 733 (8th Cir. 1990) (as in *Brazzell*, holding that plaintiff was excused due to alleged reliance on the bad advice of her doctors).

In *O'Connor v. Boeing North American, Inc.*, 311 F.3d 1139 (9th Cir. 2002), reviewing the application of the FRCD, the Ninth Circuit considered factors such as plaintiffs' doctors' failure to advise of possible causal link and other conflicting evidence on cause. In replacing California's accrual rule, the *O'Connor* Court looked to "actual knowledge" of cause and factors that questioned causation. *See also Rosales v. United States*, 824 F.2d 799, 804 (9th Cir. 1987) (accrual of claim delayed where plaintiff relied on assurances by doctors that complications were normal).

In *Chamness v. United States*, 835 F.2d 1350 (11th Cir. 1988), the Eleventh Circuit held that accrual of plaintiff's claim was delayed where plaintiff claimed she relied on incorrect medical advice.

The Second Circuit in essence aligns with these circuits in expanding the discovery rule and eroding objective accrual criteria. Without providing any legal justification for doing so,[3] the Second Circuit gives plaintiffs the benefit of many of the excuses rejected by the First, Fourth, Sixth, Seventh and Tenth Circuits. Specifically, the Second Circuit extends accrual based on (a) the dispute among "experts" as to the cause of the plaintiffs' claimed injuries (Pet. App. A at 58a-59a), (b) incorrect or competing medical advice from government officials (Pet. App. A at 59a-61a), (c) plaintiffs' assertion that they lacked definitive and conclusive proof that the defendants' conduct caused their injuries (Pet. App. A at 53a-62a), and (d) the hypothetical cost of seeking advice from the medical or scientific community (Pet. App. A at 56a, holding that the "'reasonably should have known' [standard] [does not] extend to information that was obtainable only through the private commissioning of expensive studies").[4]

The Second Circuit tolls accrual based on alleged omissions by *non-parties*. "We cannot endorse the proposition that, as a matter of law, when reports issued by the responsible public officials stated that there was no provable link between the cancers and the Landfill, members of the public reasonably should have known to the contrary." Pet. App. A at 62a. The opinions of public officials has not changed, yet plaintiffs had enough notice of their potential cause of action to commence suit in 1995.

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[3] The Second Circuit's ten page accrual analysis is devoid of legal citation other than to the summary judgment standard and the FRCD itself. See Pet. App. A at 52a-62a.

[4] The Second Circuit excuses plaintiffs from accrual in 1991 absent a $2 million dollar epidemiology study, even though plaintiffs commenced suit in 1995 without any new information (much less a multi-million dollar study).

The notion that accrual is delayed until *non-parties*, including the government, present plaintiffs with expert proof of causation, also flies in the face of policy and precedent. Plaintiffs may not "sit idly by and wait for...the federal government [or other official agencies] to prove their claims. They must do that themselves." *Carey v. Kerr-McGee Chem. Corp.*, 999 F. Supp. 1109, 1116 (N.D. Ill. 1998). For this additional reason the Second Circuit's decision cannot be reconciled with *Kubrick* and its progeny.[5] There is no basis for the Second Circuit's ruling that action or inaction *by a non-party* tolls accrual of a plaintiff's claim. This, in essence, penalizes the defendants for acts or omissions of non-parties. Again, the Second Circuit cites no authority for this novel and expansive position.

C. Circuits That Embrace An Expansive Discovery Rule Delay Accrual Indefinitely, In Essence Preventing Summary Disposition Of Claims On Statute Of Limitations Grounds.

The circuits, including the Second Circuit, that have expanded the accrual rule have in effect established a new and entirely different accrual standard. To hold that a question of

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[5] *See, e.g.*, *Kubrick*, 444 U.S. at 124 (may not rely on reassurances by Veterans Administration); *Kronisch v. United States*, 150 F.3d 112, 121 (2d Cir. 1998) (Department of Justice letters suggesting lack of claim did not toll accrual); *Gnazzo v. G.D. Searle & Co.*, 973 F.2d 136, 138 (2d Cir. 1992) (accrual is not delayed until expert opines on a causal connection); *Kansas Pub. Employees Retirement Sys. v. Blackwell*, 114 F.3d 679, 690-91 (8th Cir. 1997), *cert. denied*, 522 U.S. 1068 (1998) (Attorney General's report did not toll accrual); *Doe v. American National Red Cross*, 923 F. Supp. 753, 760 n.11 (D. Md. 1996) (government investigation did not toll accrual).

fact exists as to accrual in a "diligence-discovery" setting if there is "some" information negating causation and absent an expert opinion as to causation results in the exception becoming the rule. Such an outcome-oriented approach departs with well-established law and results in a strange dichotomy. Causation will be hotly contested and the subject of substantial debate in all but the rarest of cases. To suggest that plaintiffs' claims do not accrue until this debate is resolved will postpone accrual indefinitely.

Indeed, the Second Circuit suggests that one must have definitive proof of causation or at least have eliminated all information questioning causation before a claim accrues as a matter of law. *See, e.g.*, the Second Circuit's emphasis on "knowledge" of "cause" (Pet. App. A at 54a – must have "knowledge" or it is not sufficient as a matter of law to establish "reasonably should have *known*.").[6] "Actual knowledge" or proof of causation, however, is not required for accrual in latent exposure cases. *See, e.g., Fidler*, 714 F.2d at 199 (once on notice of a potential claim, plaintiffs' cause of action "is no longer inherently unknowable"); *Tolston*, 102 F.3d at 866 (plaintiffs come close to "suggesting that only actual knowledge of cause is enough to make the claim 'accrue' – a proposition we squarely reject[]"). Information questioning causation is not now, nor has it ever been, a rationale or excuse for postponing accrual.

A claim may accrue as a matter of law under the "knows or reasonably should have known" standard if evidence exists

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[6] In so holding, the Second Circuit departs from its prior rulings on accrual. *See, e.g., Kronisch*, 150 F.3d at 121-22 ("[P]laintiff need not have compelling proof of the validity of his claim in order for his claim to accrue – indeed, in cases where plaintiff's claim is ultimately misconceived, such proof will not exist ..."); *see also Gnazzo*, 973 F.2d at 138.

challenging causation. To hold otherwise, as the Second Circuit has, creates the ironic situation that a plaintiff with a meritorious claim, i.e., no information negating causation, gets *an earlier accrual date* than a person with a meritless claim. Surely this cannot be the law. *See, e.g., Fidler*, 714 F.2d at 200 ("The plaintiff's failure to marshal support despite diligence may mean, however, that he has received poor medical, scientific or legal advice. That result is unfortunate but is also no reason why the statute should not run.").

Consideration of exculpatory factors in the accrual analysis undermines the basic and well-established policies and principles underlying the discovery rule in significant respects. Under the FRCD, once a plaintiff is aware of the injury and its potential cause, his claim accrues. If subjective factors or excuses are a valid part of the accrual analysis, statutes of limitations are rendered meaningless, any bright line rule is erased, and parties are left to *ad hoc* justice. Such an unwarranted expansion of the discovery rule should be rejected and the proper standard (as articulated by the district court) reinstated. By the end of 1991 (at the latest) sufficient information was available such that plaintiffs reasonably should have been on notice of a possible claim based on their cancers. Pet. App. C at 178a. Plaintiffs' actions commenced in or after 1995 are time-barred.

D. Plaintiffs Who Fail Diligently To Inquire Should Not Receive The Benefit Of An Expanded Discovery Rule.

The Second Circuit's relaxation of the "diligent inquiry" requirement further departs from well-established precedent. Accrual is only postponed until plaintiff has or *with reasonable diligence* should have discovered the critical facts of both his injury and its cause. *See Urie*, 337 U.S. at 170; *Kubrick*, 444 U.S. at 122-24. A plaintiff who remains ignorant through lack of diligence cannot be characterized as

blameless and cannot rely on "blameless ignorance" as a rationale for delaying accrual. *Id.*

Plaintiffs admit they made *no inquiry at all* as to the potential cause of their injuries and that they were not aware of the information they now claim lulled them into delaying suit. Thus, plaintiffs here should be estopped from raising mitigating factors such as availability of information questioning causation. *Cf. Klehr*, 521 U.S. at 194 ("'reasonable diligence' does matter and a plaintiff who is not reasonably diligent may not assert 'fraudulent concealment' to toll the statute of limitations"); *accord Grimmett v. Brown*, 75 F.3d 506, 514 (9th Cir.), *cert. denied*, 518 U.S. 1003 (1996) (plaintiff must plead with particularity the circumstances warranting tolling and state facts showing his due diligence).

E. Certiorari Is Warranted Now Because: 1) Accrual Plays A Pivotal Role In Latent Injury Claims And 2) Disparate Application Of The Discovery Rule Will Result In Further Erosion Of The Rule.

The Second Circuit decision has ramifications far beyond the FRCD and the disposal of plaintiffs' claims. The statute of limitations, one of the oldest and central features of American common law, is a "meritorious defense, in itself serving a public interest." *Kubrick*, 444 U.S. at 117. Limitations periods represent the state's choice to provide repose for stale claims, and the marking of accrual is essential to this jurisprudence. Under any relevant standard, whether based on the allegedly wrongful act, date of diagnosis of the injury, or discovery of cause, courts recognize that the bright line objective test is required. To indefinitely delay accrual, in some instances decades after death or diagnosis, leaves the claims open to the vagaries of ever-changing science thus thwarting the purpose of repose statutes. *Wood v. Carpenter*, 101 U.S. 135, 139 (1879) (delay is the "bane" of the search for

truth and thus should not be encouraged or rewarded); *Rotella*, 528 U.S. at 559 (expansion of the discovery rule would "bar repose, prove a godsend to stale claims, and doom any hope of certainty in identifying potential liability").

The split among the circuits also results in considerable disarray as to when a claim accrues under a diligent discovery rule of accrual. Latent injury claims alleging environmental or products exposure occupy an increasing share of civil litigation. If different applications of the rule are permitted, the same claim (factually) will accrue at different times in different circuits. This is precisely the situation that warrants review by this Court.

Only this Court can resolve the problems created by the Second Circuit decision and bring clarity to this important area of the law.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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January 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 00-7724(L), 00-7728(XAP)

303 F.3d 176

RAYMOND FREIER, Individually, as Administrator of the Estate of Rose Freier, deceased, and as surviving spouse of Rose Freier, ARTHUR L. PHILLIPS, Administrator of the Estate of Leo Phillips, deceased, and Dorothy Phillips, as the surviving Spouse of Leo Phillips, TAB FUQUA, CHARLOTTE MUCHA, individually, as Executrix of the Estate of Alfred G. Mucha, deceased, and as surviving spouse of Alfred Mucha, JOHN FARINO, Administrator of the Estates of Mary Jane Farino and Robert Farino, deceased, GRACE ASTOR, individually, and as surviving spouse of Evo T. Astor, HARRY BASINSKI, SR., ELLEN BASINSKI, his spouse, KATHY KAMINSKI, Administratrix of the Estate of Joseph Inzinna, deceased, MARY YLMAR, MARIE MANOLIS, Executrix of the Estate of Louis Manolis, deceased, and individually as the surviving spouse of Louis Manolis, legal representative of the Estate of Leo Ott, deceased, and Administratrix of Mary M. Sturm, deceased, WILLIAM NEILSEN, BETTY BARABASZ, Executrix of the Estate of George Pagels, deceased, GLORIA PAGELS, Individually as the surviving spouse of George Pagels, JOSEPH GRANDILLO, executor of the Estate of Stephen Grandillo, deceased, SHIRLEY KUCZKA, Executrix of the Estate of Henry Kuczka, deceased, and individually as the surviving spouse of Henry Kuczka, MARY ANN BOXHORN, Executrix of the Estates

of Leo and Annabel Foisset, deceased, EILEEN FOLTS, Administratrix of the Estate of Helen Hancock, deceased, FRANKLIN MUELLER, FLORA MUELLER, his spouse, ROBERT S. FIELS, DELORES FIELS, his spouse, IRENE M. MARINO, legal representative of the Estate of Anthony J. Marino, deceased, and individually as the surviving spouse of Anthony J. Marino, deceased, NANCY FORMAN, CARL P. FORMAN, SR., her spouse, JOSEPH J. WIEDENBECK, JR., legal representative of the Estates of Isabelle A. Wiedenbeck and Joseph J. Wiedenbeck, Sr., deceased, LINDA KISTKA, legal representative of the Estate of Nelson M. Hirsch, deceased, NELLY ANTHONY, legal representative of the Estate of Diane Anthony, deceased, ELEANOR JASINSKI, legal representative of the Estate of Leocadia Jasinski, deceased, GEORGE SCHERRER, JR., legal representative of the Estate of George Scherrer, Sr., deceased, MARIE SCHERRER, individually as the surviving spouse of George Scherrer, Sr., deceased, VERONICA A. ZAWATSKI, legal representative of the Estate of Robert Zawatski, deceased, and individually as surviving spouse, MICHAEL LAMANCUSO, MARLENE LAMANCUSO, his spouse, THOMAS SZYPLMAN, legal representative of the Estate of Victoria Szyplman, deceased, GERALDINE DAVIES, MORLEY P. DAVIES, her spouse, KEVIN BATT, individually, as Administrator of the Estate of Charles W. Batt, deceased, and Executor of the Estate of Rose E. Batt, deceased, PATRICIA BATT, his spouse, DONNA MCKOWAN, DONALD MCKOWAN, her spouse, NORMAN WAGNER, PATRICIA WAGNER, his spouse, EILEEN EWERT, Administratrix of the Estate of Evo T. Astor, deceased, THOMAS F. HEWNER, Public Administrator of the Estate of Lorraine E. Brzezicki, deceased, LAWRENCE HEANEY, legal representative of the Estate of Gretchen Heaney, deceased, MARIE MARTZOLF, Executrix of the Estate of Robert Martzolf, deceased, and individually as surviving spouse, and

JACQUELINE MONGIOVI, Executrix of the Estate of Vincent Mongiovi, deceased, and individually as his surviving spouse,

Plaintiffs-Appellants-Cross-Appellees,

v.

WESTINGHOUSE ELECTRIC CORPORATION, ALLIED WASTE SYSTEMS, INC., formerly known as Laidlaw Waste Systems, Inc., DRESSER INDUSTRIES, INC., AMERICAN STANDARD, INC., CARBORUNDUM COMPANY, and E.I. DUPONT DE NEMOURS & CO., INC.,

Defendants-Appellees-Cross-Appellants,

GENERAL MOTORS CORPORATION, CURTISS-WRIGHT CORPORATION, WARNER-LAMBERT COMPANY, and FORD MOTOR COMPANY,

Defendants-Third-Party-Plaintiffs-Appellees-Cross-Appellants,

LITTON SYSTEMS, INC.,

Defendant-Third-Party-Defendant-Appellee-Cross-Appellant,

BROWNING-FERRIS INDUSTRIES, INC.,

Defendant-Cross-Appellant,

TRICO PRODUCTS CORPORATION, OCCIDENTAL CHEMICAL CORPORATION, WASTE MANAGEMENT OF NEW YORK, INC., NIAGARA MOHAWK POWER CORPORATION, and NEW YORK STATE ELECTRIC & GAS CORPORATION,

Third-Party-Defendants-Cross-Appellants,

HOWDEN FAN COMPANY, formerly known as Buffalo Forge Company,

Defendant-Appellee,

W.S. TYLER INC., Defendant, LANCASTER STONE PRODUCTS CORP., PAUL M. PFOHL, PFOHL BROTHERS, PFOHL ENTERPRISES, BRYAN PFOHL, and TOWN OF CHEEKTOWAGA,

Third-Party-Defendants.

UNITED STATES OF AMERICA,

Intervenor.

February 15, 2001, Argued
August 15, 2002, Decided

COUNSEL:
For Plaintiffs-Appellants-Cross-Appellees: STEVE JENSEN, Dallas, Texas, (Laura J. Van Pelt, Baron & Budd, Dallas, Texas, on the brief),

For All Cross-Appellants: LAURIE STYKA BLOOM, Buffalo, New York (Mark A. Molloy, Nixon, Peabody, Buffalo, New York, on the brief),

For Intervenor United States of America: R. JUSTIN SMITH, Attorney, Environment & Natural Resources Division, United States Department of Justice, Washington, D.C. (Lois Schiffer, Assistant Attorney General, Stephen J. Sweeney, Attorney-Advisor, Environmental Protection Agency, John A. Bryson, Environment & Natural Resources Division, United States Department of Justice, on the brief),

For Amicus The Product Liability Advisory Council, Inc., in support of Appellees: HERZFELD & RUBIN, New York, New York (Michael Hoenig, Noreen M. Giusti, New York, New York, Hugh F. Young, Jr., The Product Liability Advisory Council, Inc., Reston, Virginia, of counsel), filed a brief on behalf of Amicus Curiae.

JUDGES:
Before: KEARSE, LEVAL, and KATZMANN, Circuit Judges.

ORDER

Appeal from a judgment entered in the United States District Court for the Western District of New York pursuant to Fed. R. Civ. P. 54(b), Richard J. Arcara, Judge, dismissing on statute-of-limitations grounds certain claims alleging personal injuries resulting from toxic substances transported to and maintained in a Cheektowaga, New York landfill. Cross-appeal seeking affirmance on the ground that the federal statute relied on by plaintiffs, altering the starting date of state-law-limitations period applicable to claims of injury caused by hazardous wastes, *see* U.S.C. § 9658, is unconstitutional under the Commerce Clause and the Tenth Amendment. *See, In re Pfohl Brother Landfill Litigation*, 26 F.Supp.2d 512 (1998), 68 F.Supp.2d 236 (1999).

Vacated and remanded.

Judge Leval concurs, in a separate opinion.

OPINION

KEARSE, Circuit Judge:

Plaintiffs Raymond Freier et al. appeal from a judgment entered in the United States District Court for the Western

District of New York pursuant to Fed. R. Civ. P. 54(b), Richard J. Arcara, Judge, dismissing certain of their state-law tort claims alleging that personal injuries to themselves and their decedents were caused by toxic substances transported to and maintained in a Cheektowaga, New York landfill. The district court granted partial summary judgment dismissing those claims as untimely, ruling that under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601-9675 (1994 & Supp. V 1999), as amended by § 203 of the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. § 9658, plaintiffs' claims accrued when they knew or with reasonable diligence should have known that the injuries resulted from exposure to hazardous substances deposited in the landfill, *see In re Pfohl Brothers Landfill Litigation*, 26 F. Supp. 2d 512 (1998) ("*Pfohl I*"), but also ruling that plaintiffs should have suspected the cause of their injuries no later than the end of 1991 and that therefore, even under 42 U.S.C. § 9658, their claims, asserted beginning in 1995, were barred by the relevant statute of limitations, *see In re Pfohl Brothers Landfill Litigation*, 68 F. Supp. 2d 236 (1999) ("*Pfohl II*"). On appeal, plaintiffs contend principally that the court erred in ruling as a matter of law that they should have known no later than the end of 1991 that their injuries were caused by the landfill. They also contend that the court erroneously applied a one-year, rather than a three-year, limitations period.

Various defendants and third-party defendants have cross-appealed, urging that the judgment be affirmed in toto on the ground that 42 U.S.C. § 9658, to the extent that it alters state law as to the starting date of a state limitations period on state-law claims, is unconstitutional under the Commerce Clause and the Tenth Amendment of the Constitution. They also urge partial affirmance on the ground that § 9658 is inapplicable to claims involving the death of a plaintiff's

decedent. The United States has intervened in this Court, arguing for the constitutionality of § 9658.

For the reasons that follow, we conclude that the district court properly rejected defendants' statutory-interpretation and constitutional challenges to § 9658 and that it properly found that plaintiffs' claims were subject to the pertinent one-year limitations period. However, we conclude that there are triable issues of fact as to the time when plaintiffs reasonably should have known that the landfill materials were the cause of the injuries. Accordingly, we vacate and remand for further proceedings.

I. BACKGROUND

The present actions concern injuries alleged to have resulted from the maintenance of a landfill owned and operated principally by third-party-defendants Pfohl Brothers and Pfohl Enterprises (the "Pfohl Landfill" or "Landfill") in Cheektowaga, which is adjacent to Buffalo, New York. The Pfohl Landfill is a 120-acre area used for waste disposal. It borders Aero Lake, a fishing and swimming site, and is within a few hundred feet of Ellicott Creek, which is fed by three tributaries that flow through the Landfill. Ellicott Creek empties into the Niagara River, an international waterway between the United States and Canada. Since at least 1983, the Landfill has been listed in the New York State Registry of Active Hazardous Waste Disposal Sites.

A. The Parties and the Claims

The present actions, consolidated in the district court for all pretrial purposes sub nom. In re Pfohl Brothers Landfill Litigation, were commenced by the filing of several essentially identical complaints between January 1995 and January 1997 by more than 60 plaintiffs on behalf of

themselves or their respective decedents, alleging that the injured parties suffered from various cancers caused by exposure to toxic wastes deposited in the Pfohl Landfill. The complaints alleged that most of the plaintiffs had lived or worked in the immediate vicinity of the Landfill or had engaged in recreational activities near the Landfill. Many of the plaintiffs had used the Landfill area as an access route to Aero Lake; their children had often played in the Landfill; and residential properties were sometimes flooded when Ellicott Creek overflowed.

The defendants are companies that, between 1946 and 1969, either sent hazardous waste materials from their manufacturing operations to the Landfill or transported hazardous substances to, and deposited them in, the Landfill. Plaintiffs alleged that the cancers were caused by exposure to hazardous substances released from the Landfill through the air and water and/or released by the defendant transporters on their way to the Landfill. The complaints asserted survival, wrongful death, personal injury, and loss-of-consortium claims under New York State law, and requested compensatory and punitive damages on theories of, *inter alia*, strict liability, negligence, gross negligence, and failure to warn.

B. The Pertinent Statutes of Limitations and Claim-Accrual Dates

The present appeal focuses solely on questions relating to the statutes of limitations applicable to plaintiffs' claims. There has been no adjudication or concession on the issue of causation, and nothing in this opinion expresses any view of this Court on the merits of the causation issue.

The timeliness of the present actions, in which federal jurisdiction is premised on diversity of citizenship, is

governed by New York law, *see, e.g., Guaranty Trust Co. v. York*, 326 U.S. 99, 109-110, 89 L. Ed. 2079, 65 S. Ct. 1464 (1945); *Personis v. Oiler*, 889 F.2d 424, 426 (2d Cir. 1989), to the extent that state law is not preempted by federal law. As discussed below, New York law reflects a variety of possible dates on which a toxic tort claim may be found to have accrued, including (1) the date of the victim's first exposure to the toxic substance, (2) the date of discovery of the injury, which could be as late as the time of the victim's death, and (3) the date of discovery of the injury's cause.

New York's Estates, Powers & Trusts Law ("N.Y.E.P.T.L." or "EPTL") provides a two-year limitations period for wrongful death claims, i.e., claims on behalf of a decedent's distributees (as defined in the EPTL) who suffered pecuniary loss because of the decedent's death. *See* N.Y.E.P.T.L. § 5-4.1 (McKinney 1999). Under that section, the limitations period begins on the date of the decedent's death.

Section 214(5) of New York's Civil Practice Law and Rules ("N.Y.C.P.L.R." or "CPLR"), and CPLR § 214-c, which became effective in July 1986 and modifies § 214(5), govern claims for personal injury or property damage, including claims for pre-death injuries to a decedent's person or property ("survival claims"), *see* N.Y.E.P.T.L. § 11-3.2(b) (McKinney 2001). Section 214-c provides generally for a three-year limitations period for claims of personal injury caused by hazardous substances, *see* N.Y.C.P.L.R. § 214-c (McKinney 1990); subsection (2) of that section provides that the limitations period begins on the earlier of the date on which the injury was discovered or the date when, with reasonable diligence, the injury should have been discovered (collectively the "discovery-of-injury" date), *see id.* § 214-c(2). Subsection (4) further provides that such a claim may be asserted within one year after the date of discovery of the injury's cause ("discovery-of-cause" date), so long as the

discovery-of-cause date is within five years after the discovery-of-injury date. *See id.* § 214-c(4). Thus, § 214-c(4) "gives the plaintiff five years after the discovery (actual or constructive) of the injury to ascertain its cause. If he does not (or cannot) discover the etiology within five years, then he is barred by the statute of limitations." N.Y.C.P.L.R. § 214-c Practice Commentaries, C214-c:4, at 634 (McKinney 1990). Section 214-c(4) also provides that if the toxic tort claim is not asserted within three years after the discovery-of-injury date, the plaintiff is required to show that scientific or medical knowledge "sufficient to ascertain the cause of his injury had not been discovered, identified or determined" within that three-year period. N.Y.C.P.L.R. § 214-c(4).

Section 214(5) provides that, except as provided in § 214-c, claims of personal injury must be brought within three years of the date of injury. *See id* . § 214(5) (McKinney 1990). For purposes of toxic tort claims, the date of injury is interpreted as the date of first exposure to the hazardous substance. *See Blanco v. American Telephone & Telegraph Co.*, 90 N.Y.2d 757, 767, 666 N.Y.S.2d 536, 540, 689 N.E.2d 506 (1997); *Snyder v. Town Insulation, Inc.*, 81 N.Y.2d 429, 432-33, 599 N.Y.S.2d 515, 516-17, 615 N.E.2d 999 (1993).

Section 9658 of 42 U.S.C., enacted by Congress in 1986 as § 309 of CERCLA, provides a uniform standard for determining the accrual dates of claims of personal injury due to exposure to hazardous substances. As set out in greater detail in Part II.A. below, the section establishes a "federally required commencement date," 42 U.S.C. § 9658(a)(1) ("FRCD" or "Federal Commencement Date"), to start the running of the applicable state period of limitations governing such a claim. That date is defined as "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages . . .

were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." *Id.* § 9658(b)(4)(A).

C. Defendants' First Motion for Partial Summary Judgment, Seeking Dismissal of the Wrongful Death, Survival, and Loss-of-Consortium Claims, and Challenging the Constitutionality of § 9658

Following discovery limited to statute-of-limitations issues, defendants moved, in two stages, for partial summary judgment dismissing most of plaintiffs' claims on the ground that they were time-barred. In the first stage, in June 1997 (*see* Part I.E. below with respect to the second stage), defendants sought dismissal of the survival, wrongful death, and loss-of-consortium claims.

Defendants contended that the survival claims were barred by either CPLR § 214(5) or CPLR § 214-c. They argued essentially that some claims accrued prior to July 1986, i.e., prior to the effective date of § 214-c, and hence were governed by CPLR § 214(5)'s three-year limitations period. Defendants contended that those claims were time-barred because the injured persons were first exposed to the hazardous wastes no later than 1968, and these suits were commenced no earlier than 1995.

Defendants contended that virtually all of the remaining survival claims were barred by CPLR § 214-c(2)'s provision for a three-year limitations period, running from the earlier of the date on which the injury was discovered or the date when, with reasonable diligence, the injury should have been discovered. Noting that the latest possible discovery-of-injury date was either the date of diagnosis of the cancerous condition or the date of the decedent's death, defendants argued that at most one claim was filed within three years after the discovery-of-injury date.

As to the claims for wrongful death, defendants contended they were barred by N.Y.E.P.T.L. § 5-4.1 because these actions were commenced more than two years after the deaths of plaintiffs' decedents. Defendants also contended that the claims of loss of consortium, being derivative of the survival and wrongful death claims, could not be maintained if the underlying claims were dismissed.

In opposing this first summary judgment motion, plaintiffs did not dispute that their survival and wrongful death claims were based on injuries to or the deaths of persons who died between 1963 and 1993. However, they contended that, in accordance with the Federal Commencement Date set out in 42 U.S.C. § 9658, their claims accrued no earlier than the date on which they knew or reasonably should have known the cause of the injuries, arguing that the FRCD preempts state law with respect to the dates on which their claims accrued if state law would use an earlier date. Plaintiffs asserted that they should not reasonably have known the cause of their own or their decedents' injuries earlier than December 19, 1994, when they learned the preliminary findings of a "Pfohl Environmental Health Study" by David A. Rigle, M.D., and William R. Sawyer, Ph.D. ("the Rigle-Sawyer Report"), prepared at the request of their attorneys. Those preliminary findings stated that persons frequenting the vicinity of the Landfill had an increased risk of developing cancers, including cancers of the types suffered by plaintiffs and their decedents, because of the toxic wastes stored at the Landfill. Plaintiffs also argued that the determination of the dates on which they reasonably should have known the cause of the injuries was not an appropriate matter for summary judgment.

Because pretrial discovery had not yet been completed, defendants did not, in their first summary judgment motion,

argue for a reasonable discovery-of-cause date earlier than December 1994, but they argued that the Federal Commencement Date was either inapplicable or unconstitutional. They contended that it was inapplicable because, in focusing on "any action brought under State law for personal injury or property damages," 42 U.S.C. § 9658(a)(1), the FRCD was not meant to apply to a claim based on the death of a person other than the plaintiff. They argued that the FRCD was unconstitutional because the attempt to preempt state law as to the time of accrual of a state cause of action for purposes of a state statute of limitations exceeded Congress's powers under the Commerce Clause and was an intrusion on state sovereignty in violation of the Tenth Amendment.

D. The District Court's Rejection of the Statutory Interpretation and Constitutional Challenges, and Its Partial Denial of Summary Judgment

In an order dated October 27, 1998, the district court adopted the recommendations of Magistrate Judge Leslie G. Foschio, to whom the matter had been referred, *see Pfohl I*, 26 F. Supp. 2d at 516-50 (reprinting and adopting Magistrate Judge's Report and Recommendation dated March 11, 1998), and granted defendants' motion in part and denied it in part. The court noted that, if federal law were not applicable, all of plaintiffs' wrongful death claims and virtually all of their survival claims would be time-barred. The wrongful death claims would be barred by N.Y.E.P.T.L. § 5-4.1 because plaintiffs' respective decedents died more than two years prior to the commencement of these actions. The survival claims would be barred either (a) by CPLR § 214(5) because they were not asserted within three years after the dates of first exposure to the Landfill's allegedly toxic substances, which "occurred between the early 1900's . . . and the late 1960's," *Pfohl I*, 26 F. Supp. 2d at 520, or (b) by CPLR §

214-c because the discoveries of the injuries occurred between 1961 and 1993, and the claims were not asserted within three years after those discoveries or within one year after discovery of the cause of the injuries, *see Pfohl I*, 26 F. Supp. 2d at 521.

The district court ruled, however, that § 9658, which the court concluded was intended to apply to survival and wrongful death claims as well as to other types of personal injury claims, provides a toxic-tort-claim accrual date that preempts state law to the extent that state law would otherwise set an earlier accrual date. The court thus concluded that New York's use of the date of death as the accrual date for a wrongful death cause of action was superseded by the Federal Commencement Date, as was the maximum five-year period allowed, on other types of toxic tort claims, for discovery of the cause following the discovery of the injury.

The court also rejected defendants' challenges to the constitutionality of the Federal Commencement Date. It found no violation of the Commerce Clause, reasoning that CERCLA regulates interstate commerce and that § 9658 is an integral part of the CERCLA regulatory scheme:

> To exclude congressional regulation of accrual rules even if limited to toxic torts arising from wholly intrastate releases of hazardous wastes would frustrate Congress['s] purpose to provide greater access to the courts for injured parties as part of its comprehensive response to the national problem of controlling and remediating the effects of release of dangerous contaminants. Lack of uniformity in achieving redress in state courts for toxic torts would also lead to potential competitive imbalances in the hazardous wastes disposal industry based on differing schemes for invoking relevant statutes of repose.

> Therefore, the FRCD is an essential part of a national regulatory system established by CERCLA and represents a valid exercise of congressional power.

26 F. Supp. 2d at 543; *see also id.* ("The deterrent effect of [the FRCD] accrual formula, if it had existed earlier, upon would-be polluters could have helped to prevent the well documented assaults on the nation's natural environment by toxic substance producing industries and others."). The court also concluded that § 9658 does not violate the Tenth Amendment, reasoning principally that the FRCD does not regulate the content of state law but rather regulates access to the courts. *See id.* at 545.

Nonetheless, the district court ruled that some of plaintiffs' claims were time-barred even given the application of the FRCD. It interpreted § 9658 as superseding a more restrictive state law only with respect to the date on which a claim accrues, not with respect to the length of the limitations period. The court concluded that, given plaintiffs' failure to assert the survival claims within three years of the discovery-of-injury date, those claims, to be timely, should have been asserted within one year after plaintiffs discovered the cause of the injuries. In light of plaintiffs' admission that they had discovered that cause as early as December 19, 1994, the court ruled that survival claims that were filed later than December 19, 1995, were time-barred. The court granted summary judgment dismissing those claims. As the court could not, at the time of *Pfohl I*, determine whether a date earlier than December 19, 1994, might be the appropriate discovery-of-cause date, it denied defendants' motion to dismiss any survival claims asserted prior to December 19, 1995.

The court also denied defendants' motion to dismiss the wrongful death claims because, assuming that plaintiffs

discovered the cause of their respective decedents' injuries in December 1994, all of those claims (except those asserted in January 1997, which were not encompassed by the summary judgment motion because pretrial discovery proceedings had not been completed) had been filed within two years of the discovery-of-cause date and hence were timely. Finally, the court noted that it was possible that plaintiffs might have timely claims for loss of consortium appurtenant to timely survival claims, and it thus denied the motion to dismiss the loss-of-consortium claims as well.

E. Defendants' Second Motion for Partial Summary Judgment, Seeking Dismissal of Plaintiffs' Own Personal Injury Claims

In November 1997, during the pendency of their first motion for partial summary judgment dismissing the survival, wrongful death, and loss-of-consortium claims, defendants filed a second motion for partial summary judgment, this one seeking dismissal of claims for personal injuries suffered by the plaintiffs themselves. Defendants argued that, even assuming the Federal Commencement Date applied, those claims, first asserted in 1995, were barred by the one-year statute of limitations because they had accrued no later than the end of 1991 when, defendants contended, there existed sufficient publicly available information to put a reasonable person on notice to investigate whether there was a causal connection between his or her illness and the Landfill.

1. Defendants' Evidence of Publicity and Warnings

In support of their contention that by the end of 1991 plaintiffs should have known that their cancers were caused by the Landfill, defendants stated, *inter alia*, that beginning in 1986, large bright yellow signs warning "DANGER HAZARDOUS WASTE AREA UNAUTHORIZED

PERSONNEL KEEP OUT" were posted around the perimeter of the Landfill. Defendants submitted copies of official communications of caution, numerous newspaper articles reporting on studies by the New York State ("State") Departments of Health ("DOH") and Environmental Conservation ("DEC"), and many expressions of public concern with respect to the possibility that the Pfohl Landfill contained hazardous wastes. Defendants' exhibits included the following:

- An April 15, 1986 letter to DOH from a Cheektowaga Town Councilman requesting an assessment of the Pfohl Landfill and another site, stating that he had "observed flows into ditches and drainage channels leading to Ellicott Creek as well as along public highways. . . . Both locations are of great concern to the Town Board and are a matter of growing public interest."

- A May 31, 1986 article in The Buffalo News reporting that the Pfohl Landfill was "among 194 considered by the state to pose the most serious threat to the public and safety."

- A December 10, 1986 Memorandum of DEC stating that

> although there is a public health concern, there is no known immediate health danger associated with this site at this time. The warning signs erected address our concerns with public access to the site and to decrease the possibility of public exposure. Nearby property owners are advised to keep children away from site.

- An October 11, 1988 DEC letter to "Concerned Citizens," noting that "preliminary investigations" revealed that

> the existence of low level radiation has been identified in several areas of the landfill. After consultation with the New York State Department of Health . . ., it has been determined that the site in its present state with the levels of radiation currently encountered does not present any immediate threat to public health.

- An October 14, 1988 article in The Buffalo News describing the above DEC letter and stating that

> [e]vidence of low-level radiation has led state environmental engineers to caution persons not to enter the Pfohl Brothers landfill, a 120-acre former garbage and industrial waste dump in the northwest corner of Cheektowaga.

The article quoted a DEC engineer as stating:

> "We have been assured by the state Health Department that the radiation levels pose no threat to the public, ... But as an added safety precaution, we are sending letters to area residents and businesses asking them to avoid the site."

- A November 2, 1989 article in The Buffalo News stating that a state expert reported "'very, very minimal risk'" but that DEC officials cautioned people to avoid the area where warnings had been posted.

- An April 22, 1990 article in the suburban Buffalo Metro Community News reporting that "one of the area's top biologists" had criticized the methodology of DEC's studies.

- An August 1990 announcement by DOH of a public meeting in Cheektowaga to discuss the health assessments relating to the Landfill and the studies being conducted by DOH; the announcement also stated that DOH official Dr. James Melius would be available for individual consultations "to discuss [the resident's] health concerns as they relate to the Pfohl Brothers Landfill."

- An October 24, 1990 article in The Buffalo News reporting that tests showed lead levels at a site adjacent to the Landfill to be in excess of state standards.

Defendants noted that a number of concerned citizens of Cheektowaga and neighboring towns had formed committees to gather information about the Pfohl Landfill. In April 1990, one such group, the Pfohl Brothers Landfill Citizen Action Group (later renamed the Pfohl Brothers Landfill Cleanup Committee ("Cleanup Committee")), announced a public meeting to be held on April 24, 1990, to question the level of danger from chemical contamination at the Pfohl Landfill. The announcement stated that "Luella Kenny, former Love Canal resident, will discuss her experiences at Love Canal in the context of our concerns about action on the Pfohl Brothers Landfill."

Defendants also submitted a March 1991 report of the Cancer Surveillance Program of DOH's Bureau of Cancer Epidemiology, entitled "Cancer Incidence in the Cheektowaga/ Ellicott Creek Area, Erie County, New York"

for the period 1978-1987 ("1991 DOH Report on 1978-1987 Cancer Incidence"). The study, undertaken in response to "community concerns about cancer patterns in the Cheektowaga/Ellicott Creek area" (1991 DOH Report on 1978-1987 Cancer Incidence at 1), focused on three census tracts, Nos. 89.00, 96.00, and 100.01. This report stated that "the number of observed cancer cases among females was significantly greater than the number expected" (id. at 2), and that "only one of the three census tracts which comprised the study area exhibited a significant excess of breast cancer cases (census tract 100.01)" (*id.* at 6). Although not specified in the report, census tract No. 100.01 included the Pfohl Landfill.

In sum, defendants argued that before the end of 1991, the Pfohl Landfill had been the subject of more than 100 newspaper articles, dozens of public meetings, and numerous government reports and letters. Defendants contended that no reasonable person who lived or worked near the Landfill could still have been unaware of the health hazards posed by the Landfill and that the public displays and reports of health concerns were sufficient to put a reasonable person on notice as to the need to investigate such concerns.

2. Plaintiffs' Evidence of Official Reassurances

In opposition to this summary judgment motion, plaintiffs reiterated that the earliest they could reasonably have known that the Pfohl Landfill caused their cancers was December 1994, when they received the preliminary findings of the Rigle-Sawyer Report stating that persons frequenting that vicinity had an increased risk of developing cancers, including cancers of the types suffered by plaintiffs and their decedents, because of the toxic wastes stored at the Landfill. Plaintiffs argued that although local citizens had theretofore questioned various governmental entities as to whether the

Landfill wastes were carcinogenic, they had invariably received assurances that the area was safe. As summarized by plaintiffs' attorney,

> prior to December of 1994, not a single expert advised residents, workers, or others that the Pfohl Brothers Landfill had caused a higher incidence of cancer in the area surrounding the landfill. To the contrary, the experts that the plaintiffs/residents counted on for answers to their health questions--the New York State Department of Health--affirmatively stated that the landfill was not responsible for any health problems in the area.

(Affidavit of Laura J. Van Pelt dated December 19, 1997 ("Van Pelt Aff."), ¶ 3, at 3.)

In support of these assertions, plaintiffs submitted, *inter alia*, the affidavit of former DOH official Dr. James M. Melius, M.D., who had been the Director of DOH's Division of Occupational Health and Environmental Epidemiology from 1988 to 1995 and had supervised the preparation of several DOH studies relating to the Pfohl Landfill. These included a 1991 health survey of residents and workers in the area surrounding the Landfill, a 1991 testing of the levels of lead in the blood of 20 children living in the area surrounding the Landfill, and the 1991 DOH Report on 1978-1987 Cancer Incidence (which, as noted in Part I.E.1. above, was relied on by defendants in support of their motion for summary judgment).

Dr. Melius stated that "the health survey did not reveal any unusual patterns of reported illnesses among residents or workers." (Affidavit of Dr. James M. Melius dated December 17, 1997 ("Melius Aff."), ¶ ¶¶4.) And at a March 1991 public meeting, Dr. Melius "told the residents that the DOH's health survey did not reveal any general pattern of illness that could

be related to exposure to chemicals from the Pfohl Brothers Landfill." (*Id.* ¶ 8.)

As to the 1991 blood-lead-level study, Dr. Melius stated that it had revealed that the lead levels in the children's blood were very low, and DOH had concluded (a) that there was no way to determine whether such lead as was present resulted from exposure to the Landfill, and (b) that in any event, the sources of the lead were immaterial because the levels were so low as to give no cause for concern. (*Id.* ¶ 2.) Dr. Melius also relayed this information to area residents at public meetings and in writing, making an "effort to communicate to residents that there was no cause for concern with respect to the issue of children being exposed to lead from the Pfohl Brothers Landfill." (*Id.* ¶ 3.)

As to the 1991 DOH Report on 1978-1987 Cancer Incidence, Dr. Melius stated that "the number of observed cancer cases among females was significantly greater than expected; however, much of the overall excess among females was attributable to the significant excess of breast cancers and a non-significant excess of lung cancers." (Id. ¶ 5). Dr. Melius stated that he discussed these results with area residents at a public meeting held in March 1991 immediately after publication of the study results; that he told them that "the observed excess of breast cancer cases may be due to income, socioeconomic factors, increased cancer screening activities, and personal lifestyle and medical history factors" (*id.* ¶ 7); and that neither he nor any other DOH employee "in any way" linked the excessive number of breast cancers to the Landfill:

> I never told any member of the public, at this meeting or otherwise, that the significant excess of breast and prostate cancer cases was in any way related to the Pfohl Brothers landfill. To the best of my knowledge, no

> employee of the New York State Department of Health ever told any member of the public, at this meeting or otherwise, that the significant excess of breast and prostate cancer cases was in any way related to the Pfohl Brothers landfill.
>
> 7. At the March 1991 public meeting discussed in paragraph 6 above, I . . . told the residents that there is almost no information available that indicates that breast cancer may be related to exposure to chemicals.

(*Id.* ¶¶ 6-7 (emphases added).) Dr. Melius assured the residents that DOH would follow up on the cancer-incidence study to investigate the possible causes of the high incidence of prostate and breast cancers.

The promised reports on follow-up studies of cancer incidence were issued by DOH in November 1991, and none of them revealed any linkage with the Pfohl Landfill. Dr. Melius stated that "the follow-up study [on breast cancer] did not find a connection between breast cancer and the Pfohl Brothers Landfill because most of the women who had breast cancer had little reported potential exposure to contamination from the landfill." (Melius Aff. ¶ 9.) The follow-up study of prostate cancer likewise "did not find a connection between prostate cancer and the Pfohl Brothers Landfill because no prostate cancer cases were located east of the Greater Buffalo International Airport, which is where the landfill is located." (*Id.* ¶ 10.) In addition,

> DOH never found a statistically significant difference from the expected number of newly diagnosed cases for leukemia, lymphoma and female lung cancer. However, we examined the geographical distribution of these cancers because we were requested to do so. . . . We did not find a connection between leukemia, lymphoma or

> female lung cancer and the Pfohl Brothers Landfill because we did not find a clustering of any of these cancers around the landfill.

(*Id.* ¶ 11 (emphasis added).)

Dr. Melius communicated these follow-up results to the public, both orally and in writing "as soon as they were available." (*Id.* ¶ 12.) He also noted that

> at several public meetings that I attended in the early 1990's (both before and after the DOH health survey and cancer incidence results were announced), residents requested that homes near the Pfohl Brothers Landfill be bought by the State of New York. At each of these meetings, representatives of the New York State Departments of Health and Environmental Conservation (including myself) explained to the public that the State could not relocate residents unless there was documented evidence of a health threat, and that no such documented evidence existed.

Id. ¶ 13 (emphasis added). Summarizing DOH's communications with the public as to the results of its many studies, Dr. Melius stated that

> while I was the Director of the Division of Occupational Health and Environmental Epidemiology of the New York State Department of Health, I never told the public or any member thereof, at a meeting or otherwise, that any individual person's cancer, any particular type of cancer, any increased incidence of any particular type of cancer, or cancer in general was related in any way to the Pfohl Brothers Landfill. To the best of my knowledge, while I was the Director of the Division of Occupational Health and Environmental Epidemiology of the New

> York State Department of Health, no employee of the Department of Health ever told the public or any member thereof, at a meeting or otherwise, that any individual person's cancer, any particular type of cancer, any increased incidence of any particular type of cancer, or cancer in general was related in any way to the Pfohl Brothers Landfill.

(*Id.* ¶ 15.)

Along with Dr. Melius's affidavit, plaintiffs submitted the reports and studies to which that affidavit referred. The Van Pelt affidavit also attached several other governmental reports, excerpts from more than a dozen depositions, and scores of news articles, including the following:

- An October 26, 1989 article in the Cheektowaga Bee bearing the headline " Radiation at Pfohl site not over limits" and reporting that, although DOH warned that people should not pick up or take any objects from the site, DEC concluded, based on supplemental testing of the radiation level at the Landfill, that "'the site does not represent an immediate radiological health hazard.'"

- A November 2, 1989 article in The Buffalo News (also attached to defendants' summary judgment motion) reporting that two studies concluded that the radiation risks to the area were minimal, and that elevated radiation readings were not being detected off the Pfohl Landfill site.

- A March 30, 1990 article in The Buffalo News (also attached to defendants' summary judgment motion) bearing the headline "State calls Pfohl dump no big risk" and reporting that a DEC report to be made

available that day stated that the Landfill contains radioactive hot spots, but that the levels are within safe limits, and that "'exposure to radiation on the site presents little, if any, public health hazard.'" The article stated that

> DEC minimized the exposure threat saying:
>
> - Most of the materials are buried and exposure to radiation is therefore reduced due to the distance and shielding provided by the soil.
>
> - Transport of surface radioactive material off the site by wind is unlikely because the site has heavy vegetation and is wet in many areas.
>
> - Radioactivity found in samples of ground water, sediment and seepage is at normal background levels showing that radioactive materials are not migrating off the site.
>
> The department did warn, however, that "direct contact with radioactive materials should be discouraged" and re-emphasized its warning that people should stay off the property. It has both fenced and posted signs warning of hazardous materials.

- A November 15, 1990 article in The Buffalo News (also attached to defendants' summary judgment motion) bearing the headline "No health threat found in Pfohl Road soil tests" and stating that, according to DOH,

scientists found no significant health threat from chemicals discovered in soil samples around homes south of the Pfohl Brothers dump . . . .

Among the state's conclusions from the site in Cheektowaga are:

- There are no detectable levels of PCBs in the soil at the dump or off the site.

- Levels of dioxin and furans are only a fraction of the level necessary to require federal remedial action.

- Levels of heavy metal are "within the expected range for suburban areas."

- A March 26, 1991 article in The Buffalo News (also attached to defendants' summary judgment motion) with the headline "Study finds higher cancer rate near Pfohl site," describing the 1991 DOH Report on 1978-1987 Cancer Incidence, including findings that "people living near the Pfohl Brothers dump in Cheektowaga have exhibited higher than expected rates of breast and prostate cancer," and that there were "higher than expected instances of lymphoma and leukemias, but not high enough to be classified as a 'significant excess statistically." The article cited Dr. Melius as stating that "preliminary conclusions show . . . the increase [in the incidence of breast and prostate cancer] is likely related to income, socioeconomic and status factors"; that, based on the current, incomplete, information, "'it's unlikely it's related to chemical exposures'"; and that "'we can't tell whether the landfill is responsible.'"

- A December 17, 1991 article in The Buffalo News with the headline "Study can't link Pfohl landfill to cancer," reporting that state health officials' follow-up study of the higher-than-expected rates of cancers in the same census tract as the Landfill "failed to uncover any evidence of 'clustering' of prostate cancer, leukemia, lymphoma and female lung cancer near the inactive dump."

- A December 26, 1991 article in the Cheektowaga Times with the headline "Health Department studies fail to link landfill to cancer," reporting that "according to recent reports released by the New York State Department of Health, no link exists between the Pfohl Brothers Landfill site and cancer incidence for those residents living on or near the dump site."

- A December 2, 1993 article in the Cheektowaga Times headlined "Ground water uncontaminated near Pfohl dump" and stating that "ground water surrounding the Pfohl Brothers dump has turned up clean in all studies performed so far."

- An August 1994 DOH report entitled, "Summary of Cancer Inquiry for 1020 Rein Road, Cheektowaga," accompanied by a letter to residents of Cheektowaga stating that "none of the patterns of a true cancer cluster were found. . . . No evidence was found for a common environmental cause."

- An August 1994 assessment by the United States Department of Health and Human Services's Agency for Toxic Substances and Disease Registry ("USATSDR") of the Pfohl Landfill that "the proposed Pfohl Brothers Landfill National Priorities

List Site represents no apparent public health hazard at the present time because available data do not indicate exposures to contaminants in the environmental media to be high enough to cause adverse health effects." (Emphasis in original.) The USATSDR report also stated that "the results of NYSDOH's epidemiologic investigations, along with the lack of evidence of large scale exposure to site contaminants, indicates that the occurrence of cancer is probably not related to the site."

- An August 26, 1994 article in The Buffalo News stating: "Two studies by federal and state agencies refute charges that contamination from the Pfohl Brothers dump in Cheektowaga has caused serious health problems."

Plaintiffs also stated that although the Pfohl Landfill Cleanup Committee met with officials of DOH and DEC to seek information as to whether toxic materials were emanating from the Landfill, no more than one of the plaintiffs was a member of the group. (*See* Van Pelt Aff. ¶ 5, at 5 n.4.) Further, plaintiffs argued that, even had they been members of such groups, they would have had no reason to know that the Landfill contents were carcinogenic because those groups received assurances from the State agencies that the Landfill was safe. For example, Cleanup Committee President and Chairperson Elinor Weiss testified in her deposition that at one meeting, DOH and DEC representatives told those present that "the discovery of radioactivity at the [Landfill] was 'not that important' because [the officials] 'said that you could get more radiation from sleeping with your spouse than from standing on the Pfohl dump.'" (*Id.* ¶ 5, at 6 (quoting Deposition of Elinor Weiss at 24).)

F. The Granting of Summary Judgment

In an order dated September 22, 1999, the district court accepted the recommendations of Magistrate Judge Foschio on the second summary judgment motion, *see Pfohl II*, 68 F. Supp. 2d at 240-63 (reprinting and adopting Magistrate Judge's Report and Recommendation dated February 12, 1999), and granted, as to virtually all of plaintiffs' claims, defendants' motion to dismiss. The court found that plaintiffs had not "shown . . . that a material issue of fact exists as to the earliest time when they should have reasonably discovered the cause of their alleged injury making their claims timely under § 214-c(4) as modified by § 9658," *Pfohl II*, 68 F. Supp. 2d at 251.

Noting that CPLR § 214-c(4) provides that if the action is not filed within three years of the date of discovery of the injury, the plaintiff is required to

> "allege and prove that technical, scientific or medical knowledge and information sufficient to ascertain the cause of his injury had not been discovered, identified or determined prior to the expiration of the period within which the action or claim would have been authorized,"

Pfohl II, 68 F. Supp. 2d at 247 (quoting N.Y.C.P.L.R. § 214-c(4)), the court stated that plaintiffs were required to show that they filed their actions

> within one year of the discovery of the causes of such injuries and . . . that the state of medical, technological and scientific knowledge and information was insufficient such that it was not possible to discover the cause of their injuries within time to commence the instant actions within three years from the discovery of their cancers,

Pfohl II, 68 F. Supp. 2d at 248.

As discussed in Part II.D. below, the court found that plaintiffs could and should have developed a "reasonable suspicion" that their cancers were caused by the Landfill by the end of 1991. *Id.* 68 F. Supp. 2d at 253. It found that the "plethora of exhibits" submitted by defendants,

> consisting of government and media reports as well as other publicly available information pertaining to at least three citizen groups concerned with the effect of the Landfill on neighboring areas and residents, indicating that Plaintiffs should have developed a reasonable suspicion as to the cause of their injuries prior to the end of 1991. These exhibits establish that a highly publicized controversy existed within the local community over whether the Landfill posed a threat to the health and safety of those who resided or worked in the vicinity of the Landfill.

Id. (footnote omitted). Based on these exhibits, the court reiterated its view that the plaintiffs could reasonably have suspected the cause of their cancers by the end of 1991, stating that it was

> more than reasonable that, given the volume of information available to the public prior to 1992, Plaintiffs could be expected to reasonably suspect the cause of their cancers before the end of 1991. The vast number of media and government reports Defendants submitted in support of summary judgment were all available prior to the end of 1991.

Id. at 254.

Noting plaintiffs' reliance on the Rigle-Sawyer Report's preliminary findings in December 1994 as their earliest reason to believe that the Landfill was the cause of their own and their decedents' injuries, the court found their reliance flawed because plaintiffs did not show that they could not have obtained such a report sooner:

> Plaintiffs have submitted no evidence or any explanation as required under § 214-c(4) why it was not possible to obtain a "scientific" opinion similar to the one contained in the Rigle-Sawyer Report on which they rely in support of their contention that the FRCD occurred no earlier than December 1994, substantially prior to that date. The March and November 1991 DOH cancer incidence reports as well as the Rigle-Sawyer Report all compare the incidence of specific types of cancer diagnosed in persons who lived or worked near the Landfill with the expected incidence of similar types of cancer occurring within the general population. It is undisputed that the conclusions reached by the DOH reports issued in March and November 1991 and the Rigle-Sawyer Report differ as to whether any elevation in the incidence of any particular type of cancers occurring among those who lived or worked near the Landfill could be attributed to the hazardous and toxic substances known to have been deposited into the Landfill. A review of the February 1991 report [a DOH February 8, 1991 report based on water samples collected in October 1990, which "concluded that the levels of hazardous and toxic substances detected in the residences was not sufficient to threaten human health," *Pfohl II*, 68 F. Supp. 2d at 255] indicates that the DOH used different methods than Drs. Rigle and Sawyer to obtain specimens for the chemical analysis contained in those reports. Plaintiffs do not, however, contend that the findings contained in the Rigle-Sawyer Report are based on scientific testing techniques

> or statistical analysis that could not have been performed earlier than 1994. Nor do Plaintiffs deny [sic] that the Rigle-Sawyer Report does anything other than draw correlations between the incidence of reported cancers in the vicinity of the Landfill and the type of hazardous and toxic substances detected in the Landfill. In any event, if the Rigle-Sawyer Report is based on technical, scientific or medical knowledge developed after the dates of the earlier DOH study, Plaintiffs have not, as required by Fed.R.Civ.P. 56(e), demonstrated it.

Pfohl II, 68 F. Supp. 2d at 259 (emphases added).

On this basis, the court concluded that virtually all of plaintiffs' claims were time-barred. Judgment was entered on the dismissed claims pursuant to Fed. R. Civ. P. 54(b); the claims not found untimely were severed from the consolidated proceedings and are not at issue on this appeal.

II. DISCUSSION

On appeal, plaintiffs do not challenge the district court's ruling that, if 42 U.S.C. § 9658 were inapplicable or unconstitutional, their claims would be time-barred under New York law. Rather, they contend principally that the court erred in ruling as a matter of law that they reasonably should have known the cause of the injuries before the end of 1991 and that the Federal Commencement Date was thus no later than the end of 1991. They also contend that the court erroneously ruled that they were invariably required to file suit within one year after the discovery-of-cause date, even if that period would end less than three years after the discovery-of-injury date. Various defendants and third-party-defendants have cross-appealed, seeking affirmance, in whole or in part, on the grounds (1) that the FRCD does not apply to wrongful death or survival claims, and (2) that, in

purporting to alter state law as to the commencement date of a state limitations period for state-law claims, the FRCD (a) exceeds Congress's powers under the Commerce Clause, and (b) violates the Tenth Amendment.

For the reasons that follow, we conclude that the district court properly rejected defendants' statutory-interpretation and constitutional challenges to § 9658 and that it properly found that plaintiffs' claims were subject to the one-year limitations period following the discovery-of-cause date; but we conclude that there were triable issues of fact as to the time when plaintiffs reasonably should have known the cause of the injuries. As the resolution of defendants' challenges to the applicability and constitutionality of § 9658 is essential to the resolution of this appeal, and as plaintiffs concede that their claims would be time-barred under state law if the Federal Commencement Date were not applied, we address defendants' challenges first.

A. Defendants' Statutory Interpretation Challenges

To the extent pertinent to these actions, the Superfund Amendments to CERCLA provide as follows:

§ 9658. Actions under State law for damages from exposure to hazardous substances

(a) State statutes of limitations for hazardous substance cases

(1) Exception to State statutes

In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from

a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

(2) State law generally applicable

Except as provided in paragraph (1), the statute of limitations established under State law shall apply in all actions brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility.

(b) Definitions.

As used in this section--

(1) Subchapter I terms

The terms used in this section shall have the same meaning as when used in subchapter I of this chapter.

(2) Applicable limitations period

The term "applicable limitations period" means the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this section may be brought.

(3) Commencement date

The term "commencement date" means the date specified in a statute of limitations as the beginning of the applicable limitations period.

(4) Federally required commencement date

(A) In general

[With exceptions not relevant here,] the term "federally required commencement date" means the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.

42 U.S.C. § 9658. Subchapter I of CERCLA defines "facility" to include any " landfill, storage container, [or] motor vehicle" and "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed." *Id.* § 9601(9). The term "release" includes leaking, emitting, discharging, escaping, leaching, dumping, and disposing of hazardous substances into the environment, *id.* § 9601(22); the term "environment" includes "ambient air" and "navigable waters" of the United States, *id.* § 9601(8).

The language of § 9658(a)(1), specifying that the applicable state limitations period "shall commence at the federally required commencement date in lieu of" an "earlier" date provided by state law, makes it indisputably clear that Congress intended, in the cases to which § 9658 applies, that the FRCD preempt state law accrual rules if, under those rules, accrual would occur earlier than the date on which the cause of the personal injury was, or reasonably should have been, known to be the hazardous substance. *Accord Union Pacific R.R. Co. v. Reilly Industries, Inc.*, 215 F.3d 830, 840 (8th Cir. 2000). *Cf. ABB Industrial Systems, Inc. v. Prime*

Technology, Inc., 120 F.3d 351, 360 n.5 (2d Cir. 1997) ("Under 42 U.S.C. § 9658, if a claim is brought under state law for property damages caused by hazardous chemicals and state law does not provide a discovery rule, the state statute of limitations cannot begin to run until the plaintiff knew or should have known that the damages were caused by hazardous chemicals."); *Tucker v. Southern Wood Piedmont Co.*, 28 F.3d 1089, 1091 (11th Cir. 1994) (same).

In arguing that the district court misinterpreted § 9658, defendants do not dispute that the section has preemptive effect on claims that are within its intended scope; but they contend (1) that survival claims are not within its scope because the word "plaintiff" in § 9658(b)(4)(A)'s phrase "the date the plaintiff knew (or reasonably should have known)" should be read to refer to the person who suffered the personal injury, rather than to the individual bringing the lawsuit, and (2) that wrongful death claims are not encompassed by § 9658 because they are not, under New York law, claims for "personal injury[] or property damages."

In construing a statutory provision, we look first to see whether it is clear or is instead ambiguous. *See, e.g., Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 136 L. Ed. 2d 808, 117 S. Ct. 843 (1997). We determine whether the provision is ambiguous by examining its language, the context in which the language is used, and the broader context of the statute as a whole. *See id.* at 341. If the provision is precise and unambiguous, we generally need look no further. *See, e.g., id.* at 340; *Connecticut National Bank v. Germain*, 503 U.S. 249, 254, 117 L. Ed. 2d 391, 112 S. Ct. 1146 (1992); *Greenery Rehabilitation Group, Inc. v. Hammon*, 150 F.3d 226, 231 (2d Cir. 1998) ("If the statutory terms are unambiguous, our review generally ends and the statute is construed according to the plain meaning of its

words."). If the statute is ambiguous, we look to legislative history as a means of determining congressional intent. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 896, 79 L. Ed. 2d 891, 104 S. Ct. 1541 (1984); *Auburn Housing Authority v. Martinez*, 277 F.3d 138, 143-44 (2d Cir. 2002).

We conclude that these principles require rejection of defendants' contention that § 9658 does not encompass survival and wrongful death claims, for we find that its language unambiguously encompasses the former, and that, in light of the statutory scheme as a whole, it was meant to encompass the latter.

1. Applicability of the FRCD to Survival Claims

The scope of the FRCD is set in subsection (a)(1) of § 9658; by its terms, the section applies to "any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance . . . released into the environment from a facility." 42 U.S.C. § 9658(a)(1) (emphasis added). Subsection (a)(1) does not use the term "plaintiff." Nor does it specify by whom such personal injury actions must have been brought or state any limitation as to the persons on whose behalf the actions may have been brought. The absence of any such limiting provisions suggests that the scope of the section is sufficiently broad to encompass not only a suit brought by the person injured, but as well a suit brought by a person who has the right to represent the person injured, such as his guardian or the executor of his estate. Absent any such qualifications of the phrase "any action brought," which on its face is all-encompassing, the implication of subsection (a)(1) is that § 9658 is meant to apply to any personal injury or property damage claim asserted by any person on whom state law confers standing to assert it.

Nor do we see in the language of subsection (b)(4)(A), which does use the word "plaintiff" in defining the FRCD in terms of the "date the plaintiff knew (or reasonably should have known)" the cause of the injury, *id.* § 9658(b)(4)(A), any intimation whatever that the plaintiff must be the person who suffered the injury or that the person who suffered the injury must be the person who discovered its cause. Had Congress intended to limit the scope of the FRCD in this way, it could more simply have drafted this subsection to refer to 'the date the plaintiff knew (or reasonably should have known) that his or her personal injury . . . was caused or contributed to by the hazardous substance.' Instead, subsection (b)(4)(A) refers to knowledge of the plaintiff that the hazardous substance caused "the personal injury . . . referred to in subsection (a)(1)." *Id.* § 9658(b)(4)(A) (emphasis added). Given subsection (a)(1)'s broad scope, encompassing "any [personal injury] action brought," we think it plain that Congress meant the FRCD to have potential application whenever a claim for personal injury is brought by any person who, under state law, has standing to bring such a claim.

Defendants' contention that this interpretation is impermissible because it allows for an open-ended limitations period, hinging on the fortuity of when the cause of injury is discovered, is wide of the mark. The Federal Commencement Date is not wholly subjective, for it is defined not only as the time at which the plaintiff has actual knowledge of the cause, but also as the time at which the plaintiff reasonably should have had that knowledge. The latter sets an objective standard, and if the two dates differ, § 9658(b)(4)(A) implicitly makes the FRCD the earlier.

Defendants also argue that reading the term "plaintiff" to mean the person who brings the suit will facilitate "abuse" by allowing a decedent's heirs to have the suit instituted by one "who only recently learned the cause" of the decedent's

injuries, in order to make the suit timely despite the fact that "a myriad of others (including the decedent) may have discovered it much earlier." (Defendants-Third-Party-Defendants-Appellees-Cross-Appellants' brief on appeal at 88-89.) This contention is likewise unpersuasive, as § 9658(b)(4)(A)'s objective standard for accrual will apply if there was sufficient information that a plaintiff reasonably should have known the cause of the injury earlier than he actually knew. In any event, defendants' speculative policy concerns cannot override the clear provisions of the statute.

In sum, we conclude that the district court did not err in ruling that survival claims are within the scope of § 9658.

2. Applicability of the FRCD to Wrongful Death Claims

Defendants' contention that the FRCD does not apply to wrongful death claims presents a somewhat closer question on the surface but is ultimately unpersuasive. Defendants argue that, although New York law characterizes survival claims as personal injury claims, it does not so characterize wrongful death claims, and hence the latter are not actions "brought under State law for personal injury[] or property damages" within the meaning of § 9658(a)(1). Given the possible variations among the laws of the several states, that phrase is not entirely free of ambiguity; but in light of Congress's intent in creating the Federal Commencement Date, we conclude that wrongful death claims under New York law were meant to be encompassed by § 9658.

As discussed in Part II.B. below, the FRCD was introduced as one of the 1986 Superfund Amendments to CERCLA. Section 301(e) of CERCLA, as originally enacted in 1980, required Congress to obtain a study of "the adequacy of existing common law and statutory remedies in providing legal redress for harm to man and the environment caused by

the release of hazardous substances into the environment." 42 U.S.C. § 9651(e)(1) (emphasis added). After reviewing the commissioned study, congressional committees noted that the report, prepared "by a distinguished panel of lawyers," concluded that because of the accrual dates selected by state law, "certain State statutes deprive plaintiffs of their day in court." H.R. Conf. Rep. No. 99-962 (1986) ("FRCD Conf. Rep."), at 261, *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354; Report of the House of Representatives Committee on Energy and Commerce, H.R. Rep. No. 99-253(I) (1985) ("FRCD House Rep."), at 105, *reprinted in* 1986 U.S.C.C.A.N. 2835, 2887. The congressional committees recognized that "in the case of a long-latency disease, such as cancer, a party may be barred from bringing his lawsuit if the statute of limitations begins to run at the time of the first injury--rather than from the time when the party ' discovers' that his injury was caused by the hazardous substance or pollutant or contaminant concerned." FRCD Conf. Rep. at 261, reprinted in 1986 U.S.C.C.A.N. at 3354; *see also* FRCD House Rep. at 105, reprinted in 1986 U.S.C.C.A.N. at 2887. As a result, the FRCD was introduced to "address[] the problem identified in the 301(e) study," by "providing for a Federal commencement date for State statutes of limitations which are applicable to harm which results from exposure to a hazardous substance," defining that commencement date as "the date the plaintiff knew, or reasonably should have known, that the personal injury referred to above was caused or contributed to by the hazardous substance or pollutant or contaminant concerned." FRCD Conf. Rep. at 261, reprinted in 1986 U.S.C.C.A.N. at 3354 (emphases added). Thus, Congress's focus was on hazardous wastes' "harm to man," 42 U.S.C. § 9651 (e)(1), and its intent was to make the FRCD applicable to claims for "harm which results from exposure to a hazardous substance," FRCD Conf. Rep. at 261, reprinted in 1986 U.S.C.C.A.N. at 3354.

Given this background, we see no valid basis for inferring that Congress meant § 9658 to distinguish between an action for wrongful death, as maintainable under New York law, and an action brought by a living victim. A living victim in a personal injury action may recover for, *inter alia*, damages for lost future earnings. *See, e.g., Lopez v. Kenmore-Tonawanda School District,* 275 A.D.2d 894, 895, 713 N.Y.S.2d 607, 609 (4th Dep't 2000) (mem.). Such a recovery would usually to some extent benefit the victim's dependents. If the victim has died, damages for his lost future earnings are recoverable only in a wrongful death action. *Compare Sand v. Chapin*, 238 A.D.2d 862, 863, 656 N.Y.S.2d 700, 701 (3d Dep't 1997) (mem.) (lost future earnings not recoverable in survival action), and N.Y.E.P.T.L. § 11-3.3 Practice Commentaries at 346 (McKinney 2001) (permissible recovery in survival action "includes only damages accruing until [the decedent's] death"), with *Parilis v. Feinstein*, 49 N.Y.2d 984, 985, 429 N.Y.S.2d 165, 166, 406 N.E.2d 1059 (1980) (mem.) (in a wrongful death action, recovery is permissible for "loss of support, voluntary assistance and possible inheritance"), and N.Y.E.P.T.L. 5-4.3(c)(ii) and (iii) §§ (factfinder in a wrongful death action must consider the amount of income taxes the decedent would have been required to pay from the "sum that would otherwise be available for the support of persons for whom the action is brought").

Indisputably, the claim by a living victim for future earnings lost as a result of the injuries he suffered from exposure to hazardous wastes is one "for personal injury" within the meaning of § 9658(a)(1). Yet under defendants' proposed interpretation of the FRCD, wrongful death claims by the decedent's distributees for relief paralleling that which would have been available to the victim had he lived, including claims seeking their respective shares of the decedent's

earnings lost as a result of that exposure, would not be within the scope of § 9658. Quite clearly then, under defendants' view of the FRCD, a company whose handling of hazardous wastes caused personal injury would be financially better off if its victim died. We conclude that this was not Congress's intent.

B. Defendants' Commerce Clause Challenge

The Commerce Clause of the Constitution grants Congress the power "to regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. Although the power to enact laws under the Commerce Clause is subject to "judicially enforceable outer limits," *United States v. Lopez*, 514 U.S. 549, 566, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), the "power is 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution,'" *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196, 6 L. Ed. 23 (1824)). "Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *United States v. Morrison*, 529 U.S. 598, 607, 146 L. Ed. 2d 658, 120 S. Ct. 1740 (2000).

The Supreme Court "has made clear that the commerce power extends not only to 'the use of channels of interstate or foreign commerce' and to 'protection of the instrumentalities of interstate commerce . . . or persons or things in commerce,' but also to 'activities affecting commerce.'" *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 276-77 (quoting *Perez v. United States*, 402 U.S. 146, 150, 28 L. Ed. 2d 686, 91 S. Ct. 1357 (1971)). In determining whether

Congress has exceeded its authority under the Commerce Clause, we may look to, *inter alia*, whether the activity regulated is economic in nature, whether there are discernible ties to commerce, whether the type of activity as a whole has an effect on commerce, and what congressional findings have been made with respect to the activity's effects on commerce. *See, e.g., Lopez*, 514 U.S. at 559-63; *see also Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765, 778 (2d Cir.), *cert. denied*, 528 U.S. 868, 145 L. Ed. 2d 140, 120 S. Ct. 166 (1999). A federal statute will survive a Commerce Clause challenge if it regulates activities that arise out of or are connected with a commercial transaction when the transaction and the activities, viewed in the aggregate, substantially affect interstate commerce. *See, e.g., Wickard v. Filburn*, 317 U.S. 111, 127-29, 87 L. Ed. 122, 63 S. Ct. 82 (1942) (rejecting Commerce Clause challenge to federal statute regulating production and consumption of homegrown wheat because wheat farming as a whole substantially affects interstate commerce); *see also Lopez*, 514 U.S. at 561 (upholding Commerce Clause challenge to federal statute prohibiting possession of firearm in school zone, where prohibition was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated"). "'Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations.'" *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 277 (quoting *Fry v. United States*, 421 U.S. 542, 547, 44 L. Ed. 2d 363, 95 S. Ct. 1792 (1975)).

Further, when Congress has enacted a statute creating a program to regulate aspects of commercial transactions that, viewed in the aggregate, substantially affect interstate commerce, it is not necessary that each element of the

regulatory scheme have a substantial connection with commerce when viewed in isolation. An individual provision will survive a Commerce Clause challenge if it is "an integral part of the regulatory program[,] and . . . the regulatory scheme when considered as a whole" can be shown to be "independently and directly related to a valid congressional goal." *Hodel v. Indiana*, 452 U.S. 314, 329 n.17, 69 L. Ed. 2d 40, 101 S. Ct. 2376 (1981); *see also Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 757 n.22, 72 L. Ed. 2d 532, 102 S. Ct. 2126 (1982).

The FRCD is part of CERCLA, 42 U.S.C. §§ 9601-9675. The stated purpose of CERCLA, which defines the term "environment" to include "ambient air" and "navigable waters" of the United States, 42 U.S.C. § 9601(8), is "to provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites," Pub. L. No. 96-510, 94 Stat. 2767, 2767 (1980). *See also* Report of the House of Representatives Committee on Interstate and Foreign Commerce, H.R. Rep. No. 96-1016(I) (1980) ("CERCLA House Rep."), at 17, *reprinted in* 1980 U.S.C.C.A.N. 6119, 6119-20 (bill that became CERCLA was designed to give the United States Environmental Protection Agency ("EPA") authority to deal effectively with spills of hazardous substances as well as with "the tragic consequences of improperly, negligently, and recklessly hazardous waste disposal practices known as the inactive hazardous waste site problem" (internal quotation marks omitted)); *id.* at 18, *reprinted in* 1980 U.S.C.C.A.N. at 6120 ("In 1979 the EPA estimated that as many as 30,000 to 50,000 sites existed, of which between 1,200-2,000 present a serious risk to public health.").

In furtherance of its purposes, CERCLA permits the government to address environmental emergencies by

removing hazardous substances immediately, *see* 42 U.S.C. § 9604(a); authorizes a national plan establishing procedures and standards for responding to releases of hazardous substances, *see id.* § 9605(a); authorizes the President to issue administrative orders, or to seek court orders, directing responsible entities to clean up hazardous waste sites, *see id.* § 9606(a) imposes liability for clean-up costs on entities responsible for the disposal of hazardous wastes, *see id.* § 9607(a) (permitting the government and private parties to recover the costs involved in the cleanup of hazardous wastes from those responsible for their creation); and imposes liability for damage to natural resources, *see id.* § 9607(f) (permitting the government to recover for such damage). These and other provisions are directed toward Congress's goals of, *inter alia*, "providing for liability of persons responsible for releases of hazardous waste at such sites," CERCLA House Rep. at 1, *reprinted in* 1980 U.S.C.C.A.N. at 6119, and "inducing such persons voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites," *id.* at 17, *reprinted in* 1980 U.S.C.C.A.N. at 6120 (emphasis added).

Accordingly, it is recognized that CERCLA is "principally designed to effectuate the cleanup of toxic waste sites [and] to compensate those who have attended to the remediation of environmental hazards," *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483, 134 L. Ed. 2d 121, 116 S. Ct. 1251 (1996), and that "the 'two . . . main purposes of CERCLA' are 'prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party,'" *id.* (quoting *General Electric Co. v. Litton Industrial Automation Systems, Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990), *cert. denied*, 499 U.S. 937, 113 L. Ed. 2d 446, 111 S. Ct. 1390 (1991)).

In passing CERCLA, Congress did not include legislative findings with respect to the statute's relationship to interstate commerce. However, it is clear that the generation and disposal of waste material by companies in connection with the manufacture or processing of products is a business activity, and that the storage of such wastes by others is economic activity. *See generally Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 504 U.S. 353, 359, 119 L. Ed. 2d 139, 112 S. Ct. 2019 (1992) ("Solid waste, even if it has no value, is an article of commerce."); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 119 L. Ed. 2d 121, 112 S. Ct. 2009 (1992); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 57 L. Ed. 2d 475, 98 S. Ct. 2531 (1978). And it is clear that such wastes are commonly transported in interstate commerce. *See generally Chemical Waste Management*, 504 U.S. at 337 (in 1992, only 16 states had commercial hazardous waste landfills); *cf. New York v. United States*, 505 U.S. 144, 150, 159-60, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992) (because few states have disposal sites for low-level radioactive waste, and space in those sites is frequently sold by residents of one state to residents of another, "regulation of the resulting interstate market in waste disposal is . . . well within Congress' authority under the Commerce Clause"). Further, even wholly intrastate disposal of hazardous wastes can threaten interstate and foreign commerce, as those wastes can contaminate streams that run through landfills and feed into tributaries of navigable waters. Thus, "Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders." *Id.* at 149.

In considering legislation to promote safer containment of hazardous wastes and to decrease pollution of the ambient air and navigable waters by such materials, Congress plainly sought to deal with matters that substantially affected

interstate commerce. As the Court of Appeals for the Eleventh Circuit observed in *USA v. Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997),

> [w]hen the Senate considered S. 1480, a bill containing cleanup liability provisions later substantially incorporated into CERCLA, its Committee on Environment and Public Works ("the Committee") took notice of many facts that show a nexus between all forms of improper waste disposal and interstate commerce. First, the Committee noted the growth of the chemical industry and the concomitant costs of handling its waste. *See* S.Rep. No. 96-848, 96th Cong., 2d Sess. 2 (1980), *reprinted in* 1 Legislative History of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, at 309 (1983). It also cited a 1980 report by the Office of Technology Assessment which gauged agricultural losses from chemical contamination in six states at $ 283 million. *Id.* at 310. The Committee reported that the commercial damages resulting from unregulated waste management were not attributable solely to interstate trafficking in hazardous materials for disposal, but also arose from accidents associated with purely intrastate, on-site disposal activities, such as improper waste storage in tanks, lagoons and chemical plants. *Id.* at 312. Thus, CERCLA reflects Congress's recognition that both on-site and off-site disposal of hazardous waste threaten interstate commerce.

107 F.3d at 1511 (footnotes omitted) (emphasis added). Clearly, CERCLA itself was enacted as a response to a national problem, was directly related to a valid congressional concern, and was within Congress's powers under the Commerce Clause. *See, e.g., id.*

Indeed, defendants do not contend that CERCLA exceeds Congress's powers under the Commerce Clause. Rather they argue that the FRCD alone is unconstitutional. (*See* Defendants-Third-Party-Defendants-Appellees-Cross-Appellants' brief on appeal at 74-75 n.23 ("the FRCD may be severed and the remainder of CERCLA may be left in force").) However, defendants' Commerce Clause challenge to the FRCD ignores the FRCD's function in furthering the goals of CERCLA.

As noted, one of CERCLA's goals was to "induce" companies generating, transporting, dumping, and storing, etc., hazardous wastes "voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites," CERCLA House Rep. at 17, *reprinted in* 1980 U.S.C.C.A.N. at 6120. We think it plain that the FRCD provides such inducement. As discussed in Part II.A.2. above, the FRCD was adopted in response to findings, made in a study required by § 301(e) of CERCLA, that state-law dates of accrual of claims for injuries caused by exposure to hazardous substances--especially injuries having a long latency period, such as cancer--frequently resulted in such claims becoming time-barred even before the injured person knew the cause of his injury. In requiring that the courts apply instead, if later than the state-law date, an objective accrual date, to wit, the date when the plaintiff "reasonably should have known" the injury's cause, § 9658 gives companies responsible for hazardous wastes greater incentives to clean up the waste sites, for it exposes those companies to a longer period of liability for the harms those sites cause to human health and the environment. The longer the period of liability, the more likely it is that a responsible company will bear the expense of the harms it has caused. The greater the potential cost to the company, the greater the likelihood that the company will strive to avoid liability by taking appropriate remedial actions with respect to its

hazardous waste sites. And the more remedial action that is undertaken voluntarily, the less the need for government intervention, and the cleaner the environment.

In sum, we conclude that the FRCD is an integral part of the regulatory scheme established by CERCLA, furthering CERCLA's goals in various ways, and that the enactment of the FRCD constituted a valid exercise of Congress's powers under the Commerce Clause.

C. Defendants' Tenth Amendment Challenge

Defendants also contend that the FRCD violates the Tenth Amendment, arguing that it effectively alters certain state statutes of limitations, overruling important policy choices made by a state legislature that had evaluated and balanced the competing interests, and that the FRCD improperly coerces states to regulate state-law toxic tort claims according to a federal formula. Notwithstanding the skepticism expressed in ABB Industrial Systems, Inc. v. Prime Technology, Inc., in which we stated that the FRCD was of "questionable constitutionality," 120 F.3d at 360 n.5, while noting that the issue was not properly before us, *see id.*, we reject defendants' challenge.

The Tenth Amendment provides that " the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The Tenth Amendment limits Congress's regulatory power, preventing Congress from essentially "commandeering" a state's legislative or executive departments "'by directly compelling them to enact and enforce a federal regulatory program.'" *New York v. United States*, 505 U.S. at 161 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 288); *see also Printz v. United States*, 521

U.S. 898, 935, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997) (Congress may "not command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program").

The FRCD, however, does not conscript into federal service either the state's legislature or its executive branch. Rather, in order that persons victimized by exposure to hazardous wastes not be "deprived . . . of their day in court," FRCD Conf. Rep. at 261, *reprinted in* 1986 U.S.C.C.A.N. at 3354, and that the companies that substantive state law would hold responsible not escape liability, the FRCD simply requires courts in which state-law toxic tort claims are asserted to recognize that such a claim did not accrue before the plaintiff knew or reasonably should have known the cause of the injury. This is a modest requirement that is squarely within Congress's long established powers under the Supremacy Clause of the Constitution.

The Supremacy Clause provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2 (emphasis added). Accordingly, consistent with the Tenth Amendment, Congress may create federal causes of action that state courts are obligated to adjudicate. *See, e.g., Testa v. Katt*, 330 U.S. 386, 91 L. Ed. 967, 67 S. Ct. 810 (1947). Or it may enact a federal law that preempts a state-law cause of action, thereby foreclosing state courts from entertaining such a state-law claim. *See generally English v. General Electric Co.*, 496 U.S. 72, 78-79, 110 L. Ed. 2d 65, 110 S. Ct. 2270 (1990). Or Congress may, as it has done on occasion, simply extend a state limitations period. *See, e.g., Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 20 L. Ed. 176 (1870)

(upholding federal statute tolling limitations periods for actions against persons who could not be served with process because they were in Confederate territory); *see also* 50 U.S.C. app. § 525 (tolling limitations periods for actions by or against persons in active military service); 28 U.S.C. § 1367(d) (tolling state limitations period on state claim asserted in federal court based on supplemental jurisdiction, if federal court thereafter declines to exercise such jurisdiction); 15 U.S.C. § 6603(h) (extending limitations periods for mortgage foreclosure actions where Y2K-related failures impeded processing of mortgage payments).

Simply put, the Tenth Amendment does not prevent the application of federal law in state courts even though "federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them," because "this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause." *New York v. United States,* 505 U.S. at 178-79. The FRCD, which requires no action by a state's legislative or executive officials, but only the application of federal law by the courts to recognize the Federal Commencement Date of a state-law claim, does not violate the Tenth Amendment.

Having rejected all of defendants' statutory interpretation and constitutional challenges to the application of the FRCD, we turn to plaintiffs' challenges to the district court's dismissal of their claims.

D. Plaintiffs' Challenge to the Ruling That, As a Matter of Law, the FRCD Was Not Later Than the End of 1991

As discussed in Part I.F. above, the district court granted summary judgment dismissing plaintiffs' claims as time-barred on the ground that there was no genuine issue of fact to be tried as to the date on which their claims accrued under

the FRCD, ruling that, as a matter of law, that date was no later than the end of 1991. In so ruling, the court found principally that the government and media reports and public controversy over the health hazards posed by the Landfill sufficed to give plaintiffs "a reasonable suspicion" as to the cause of their cancers prior to the end of 1991, *Pfohl II*, 68 F. Supp. 2d at 253, and that plaintiffs failed to show "why it was not possible to obtain a 'scientific' opinion similar to the one contained in the Rigle-Sawyer Report" earlier than 1994, *id.* at 259. We have several difficulties with the legal standards applied by the district court and with its view of the factual record.

1. The Legal Standards Applied by the District Court

First, the district court erroneously imputed to the Federal Commencement Date a standard of "reasonable suspicion." *See, e.g., Pfohl II*, 68 F. Supp. 2d at 253 (plaintiffs "should have developed a reasonable suspicion as to the cause of their injuries prior to the end of 1991" (emphasis added)); *id.* at 254 ("given the volume of information available to the public prior to 1992, Plaintiffs could be expected to reasonably suspect the cause of their cancers before the end of 1991" (emphasis added)); *id.* at 257 ("no reasonable trier of fact could find that Plaintiffs, had they been reasonably diligent in inquiring as to the cause of their cancers upon being diagnosed, would not have discovered sufficient information to develop a reasonable suspicion as to the cause of such injuries prior to the end of 1991" (emphasis added)). In so reasoning, the district court apparently accepted "Defendants['] contention that a reasonable suspicion that an injury may have been caused by exposure to toxic or hazardous substances is sufficient to trigger a rule of limitations that is predicated on knowledge of a fact or event," *id.* at 252 (emphases added). Insofar as the FRCD is concerned, this contention should have been rejected.

The discovery-of-cause standard set by the FRCD, defined as "the date the plaintiff knew (or reasonably should have known) that the personal injury" was caused or contributed to by the hazardous materials, focuses on knowledge, actual or imputed, not on suspicion. Mere suspicion, whatever its reasonableness, cannot be equated with knowledge; and the fact that a claimant had only a "reasonable suspicion" that the injuries were caused by the Landfill is not a sufficient basis for ruling as a matter of law that the claimant "reasonably should have known" (emphasis added) that the injuries were caused by the Landfill. Accordingly, the district court applied an erroneous legal standard in interpreting the FRCD.

Second, in addressing the showing that a plaintiff is required to make under New York's CPLR § 214-c(4) as to the state of scientific or medical knowledge as to the cause of injury, the court applied a standard of impossibility of such knowledge. *See, e.g., Pfohl II*, 68 F. Supp. 2d at 248 (plaintiffs were required to show "that the state of medical, technological and scientific knowledge and information was insufficient such that it was not possible to discover the cause of their injuries within time to commence the instant actions within three years from the discovery of their cancers" (emphasis added)); *id.* at 257 ("Plaintiffs have failed to establish the existence of a material issue of fact that such cause could not have been determined prior to the end of 1991" (emphasis added)). As discussed below, it is not clear to us that this is a correct interpretation of the CPLR provision as a matter of state law; but it is clear that to the extent the CPLR provision would result in an earlier accrual date than that provided by the FRCD, the CPLR provision is preempted.

The district court's interpretation that a plaintiff must show that the cause of the injury "could not have been" determined within three years after the date of discovery of the injury

does not match the language of the statute itself. That section states that if the action is not filed within that period the plaintiff is required to show that, prior to the expiration of that period, "technical, scientific or medical knowledge and information sufficient to ascertain the cause of his injury had not been discovered, identified or determined." N.Y.C.P.L.R.§ 214-c(4) (emphasis added). (We note that, though the phrase "had not been" is straightforward enough, some joinders of subjects and predicates in this passage are somewhat awkward: For example, is "scientific knowledge" "discovered"? Is "scientific knowledge" "determined"--and if so, does the word "determined" connote a consensus? And does "scientific knowledge" mean, as the district court viewed it in *Pfohl II*, 68 F. Supp. 2d at 259, "'scientific' opinion"? *See also* N.Y.C.P.L.R. § 214-c Practice Commentaries , C214-c:4, at 635 (The statute "reeks of the midnight oil of political compromise. . . . The draftsmanship cannot be described as commendable.").)

Despite the difference between the district court's phrase "could not have been" determined and the statute's phrase "had not been" determined, the district court's standard finds some explicit--but not unequivocal--support in the New York practice commentaries. For example, the official commentator states that "the plaintiff must demonstrate [a] that the state of medical or scientific knowledge was such that the causation of his injury could not have been identified within the three-year period" after the discovery of the injury, N.Y.C.P.L.R. § 214-c(4) Practice Commentaries, C214-c:4, at 634-35 (emphasis added), and "[b] that it was impossible to determine the cause of his injury within three years after the discovery of his injury," *id.* at 635 (emphasis added). To that extent, therefore, the official commentary supports the district court's view of New York law.

Nonetheless, the official commentary also, after noting the less-than-"commendable" legislative draftsmanship, states that the New York Legislature "apparently intended . . . [that] the test should be: Was the requisite scientific knowledge reasonably available to the plaintiff during the three-year discovery period?" N.Y.C.P.L.R. § 214-c Practice Commentaries, C214-c:4, at 635 (emphasis added). This seems to us the more reasonable interpretation of New York law, for the district court's construction would seem to place burdens on a would-be plaintiff that the Legislature could not have intended. For example, the district court stated that plaintiffs could not meet the cause-could-not-have-been-determined standard because, before the end of 1991, they could have commissioned experts to conduct environmental studies and prepare a report such as the Rigle-Sawyer report. However, "'the reasonable cost of a site-specific study to determine whether there has been an excess number of cancer cases related to a multiple toxic agent environmental cause such as the Pfohl Brothers Landfill would be at least two (2) million dollars.'" (Van Pelt Aff. ¶ 41 (quoting ¶ 6 of the Affidavit of Dr. Rosalie Bertell, an expert in environmental epidemiology with more than 30 years of experience) (emphases in original).) We doubt that the New York Legislature meant to refer to scientific knowledge that would not have been available to a plaintiff without the expenditure of huge sums of money to commission independent studies. And we certainly cannot conclude that Congress meant the FRCD standard of what a plaintiff "reasonably should have known" to extend to information that was obtainable only through the private commissioning of expensive studies.

We think it likely that the official commentary's suggestion that the New York Legislature intended CPLR § 214-c(4) to refer only to scientific knowledge that was "reasonably available" to the plaintiff is the correct interpretation of that

section. And we think it possible that in intending to set a reasonable-availability-of-knowledge-of-cause standard, the New York Legislature meant to fix an accrual date no earlier than the date the plaintiff knew or reasonably should have known the cause of the injury--i.e., the same accrual date as that set by the FRCD. To the extent, however, that the scientific-knowledge provision of CPLR § 214-c(4) imposes an accrual date earlier than the date on which the plaintiff knew or reasonably should have known the cause of the injury, it is, for the reasons discussed in Part II.A. above, preempted by the FRCD.

2. The District Court's View of the Factual Record

We also conclude that the district court did not correctly apply the principles applicable to the consideration of a motion for summary judgment. In assessing such a motion, the court is required to view the factual record in the light most favorable to the party against whom summary judgment is sought and to draw all factual inferences in favor of that party. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962) (per curiam). The district court, while adverting to this standard, did not apply it.

In ruling that the FRCD was no later than the end of 1991, the district court relied on the fact that "Defendants had submitted a plethora of exhibits," principally consisting of "government and media reports"; the court found that these documents "established that a highly publicized controversy existed within the local community over whether the Landfill posed a threat to the health and safety of those who resided or worked in the vicinity of the Landfill"; and the court concluded that these documents should have raised in plaintiffs a "reasonable suspicion as to the cause of their

injuries." *Pfohl II*, 68 F. Supp. 2d at 253. The court accepted defendants' argument that as after 1991 there were no new government studies, releases of previously undisclosed information, nor any medical or scientific breakthroughs on which Plaintiffs rely as having permitted them to discover the cause of their cancers, Plaintiffs have failed to establish the existence of a material issue of fact that such cause could not have been determined prior to the end of 1991. *Id.* at 257. We have two difficulties with the court's reliance on the documents submitted by defendants.

First, many of defendants' documents themselves reflected the absence of any scientific knowledge that the Landfill was carcinogenic; and indeed, reports of expert studies suggested that it was not. For example, defendants submitted an October 11, 1988 DEC letter to "Concerned Citizens," that stated, *inter alia*, that the low radiation levels found in areas of the Landfill "does not present any immediate threat to public health." And among the statements in news articles submitted by defendants were the following: "radiation levels" at the Pfohl Landfill, according to DEC and DOH, "pose no threat to the public" (The Buffalo News, October 14, 1988); radiation risks from the Pfohl Landfill, according to State expert, are "'very, very minimal'" (The Buffalo News, November 2, 1989); "'exposure to radiation on the site,'" according to DEC, "'presents little, if any, public health hazard'" (The Buffalo News, March 30, 1990); and "no health threat found in [DOH's] Pfohl Road soil tests" (The Buffalo News, November 15, 1990).

Even the most alarming DOH report, issued in March 1991 and reporting excess numbers of certain types of cancers in 1978-1987, was, accurately, described in news articles as being accompanied by State officials' denials of any clear linkages between the cancers and the Landfill. *See, e.g.*, The Buffalo News, March 26, 1991 (DOH study finds "higher

than expected instances of lymphoma and leukemia, but not high enough to be classified as a 'significant excess' statistically"; "the increase is likely related to income, socioeconomic and status factors"; DOH "'can't tell whether the landfill is responsible'").

Thus, the district court inappropriately failed to view the documents submitted by defendants in the light most favorable to plaintiffs as the parties against whom summary judgment was sought. While defendants provided abundant evidence of the existence of controversy, much of what they submitted was either equivocal as to whether the Landfill could be causing cancers or contained outright denials of such causation. No doubt the lack of any indication in these reports and articles that there was scientific knowledge that the Landfill was carcinogenic was an impetus for defendants' urging the district court that the reasonably-should-have "known" standard of § 9658 could be satisfied by showing a basis merely for reasonable "suspicion."

Our second difficulty with the district court's application of summary judgment principles is that, in reaching its conclusions as to the date on which plaintiffs "reasonably should have known" the cause of the injuries, the district court did not acknowledge the inferences available to plaintiffs from the record as a whole. Even had the documents submitted by defendants supported an inference of early constructive knowledge rather than simply of suspicion, the court was required to consider not just those documents but also the evidence submitted by plaintiffs. The court's opinion does not indicate that it did so. For example, although noting that there were no new revelatory government studies "after 1991," *Pfohl II*, 68 F. Supp. 2d at 257, the court apparently did not take into account the fact that the latest studies done in 1991 gave plaintiffs no reason whatever to know that the cancers were caused by the

Landfill. As described in Part I.E.2. above, DOH's follow-up studies on cancer incidence, reported in November 1991, revealed no linkage with the Pfohl Landfill. The Melius affidavit described the results of those studies, the reasoning of DOH in reaching its conclusions, and the statements made by State officials to area residents that "no . . . documented evidence existed" of a health threat posed by the Pfohl Landfill (Melius Aff. ¶ 13).

The publicity surrounding the November 1991 DOH reports surely gave plaintiffs no reason to know the cancers were caused by the Landfill. The Buffalo News on December 17, 1991, carried the headline "Study can't link Pfohl landfill to cancer" and reported that the DOH follow-up study of the higher-than-expected rates of cancers in the same census tract as the Landfill "failed to uncover any evidence of 'clustering' of prostate cancer, leukemia, lymphoma and female lung cancer near the inactive dump." Similarly, the Cheektowaga Times on December 26, 1991, carried the headline "Health Department studies fail to link landfill to cancer" and reported that "according to recent reports released by the New York State Department of Health, no link exists between the Pfohl Brothers Landfill site and cancer incidence for those residents living on or near the dump site."

Subsequent articles, as well as state and federal governmental studies, continued after 1991 to report the lack of any discovery of a link between the cancers and the Landfill. *See, e.g.,* Cheektowaga Times, December 2, 1993 ("Ground water uncontaminated near Pfohl dump"; "Ground water surrounding the Pfohl Brothers dump has turned up clean in all studies performed so far."); The Buffalo News, August 26, 1994 ("Two studies by federal and state agencies refute charges that contamination from the Pfohl Brothers dump in Cheektowaga has caused serious health problems."); August 1994 DOH report (with letter to residents of Cheektowaga

stating that "none of the patterns of a true cancer cluster were found. . . . No evidence was found for a common environmental cause."); August 1994 USATSDR report ("available data [on the Pfohl Landfill] do not indicate exposures to contaminants in the environmental media to be high enough to cause adverse health effects"; "no apparent public health hazard at the present time" (emphasis in original)).

Consistent with the tenor of these news reports, Dr. Melius, who was the director of the pertinent DOH division throughout this period, stated in his affidavit that he informed area residents that there were many possible explanations for observed incidences of cancer, including socioeconomic factors, improved screening practices, personal lifestyle, and medical history. And in the many meetings and communications with area residents, neither Dr. Melius nor any other member of DOH ever told any member of the public that the cancer cases in the area were "in any way" related to the Pfohl Brothers landfill. (*See, e.g.* , Melius Aff. PP 6, 15.)

There is no question that defendants submitted to the district court numerous documents showing that there were local concerns and controversies as to whether health problems were being caused by the Pfohl Landfill. And if notice of controversy were the issue, defendants' motion for summary judgment would have had greater merit. But that is not the standard for determining the Federal Commencement Date, and the record did not permit the court to conclude that no reasonable factfinder could fail to infer that plaintiffs reasonably should have known prior to the end of 1991 that the Landfill was the cause of the injuries.

In sum, many studies had been done by two State agencies, DOH and DEC. There is no evidence that they found the

Pfohl Landfill to cause cancers, and the record is replete with evidence that the State officials repeatedly assured residents, both through the publicized reports and in personal meetings, that there was no evidence of such causation. We cannot endorse the proposition that, as a matter of law, when reports issued by the responsible public officials stated that there was no provable link between the cancers and the Landfill, members of the public reasonably should have known to the contrary.

E. The Length of the Limitations Period

Finally, plaintiffs also contend that the district court ruled, erroneously, that their survival claims were governed by a one-year limitations period. We do not so interpret the court's opinion.

The FRCD preempts a more restrictive state law only with respect to the date on which a claim accrues, not with respect to the length of the limitations period. *See* 42 U.S.C. § 9658(a)(1) ("if the applicable [state or common-law] limitations period . . . provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the [state-law] date" (emphasis added)). Thus, New York law still controls with respect to the length of the limitations period. Section 214-c, as modified by the FRCD, gives the plaintiff one year from the date of discovery of the cause of the injury to commence a lawsuit (or three years from the date of discovery of the injury, if longer) and that provision satisfies the requirements of the FRCD.

Plaintiffs advert to statements by the district court that are somewhat elliptical standing alone. *See, e.g., Pfohl I*, 26 F. Supp. 2d at 531 ("the one year period provided by § 214-c(4) will attach to the claim upon discovery of the cause of the

injury, as the FRCD permits, regardless of how much time has elapsed since the discovery of the injury" (emphasis added)); *Pfohl II*, 68 F. Supp. 2d at 249 (referring to "the proviso to § 214-c(4) limiting the benefit of the extra year within which to file a toxic tort claim to a maximum period of five years from discovery of the injury"). These statements, however, were made only in the court's discussion of the effect of the FRCD.

In directly interpreting the New York limitations periods, the court had noted that under § 214-c(4),

> if the plaintiff discovers the cause of a toxic tort injury within five years of the discovery of the injury, the plaintiff may invoke the longer of (a) the three year period from the discovery of the injury or (b) a one year period from the discovery of the cause within which to commence an action.

Pfohl I, 26 F. Supp. 2d at 521 (emphasis in original); *see also Pfohl II*, 68 F. Supp. 2d at 247 ("'an action may be commenced or a claim filed within one year of such discovery of the cause of the injury,' provided less than five years have elapsed since the discovery of the injury" (emphasis omitted)). These rulings were correct, and we do not view the court's subsequent shorthand references as overturning its direct interpretation of § 214-c.

In context, the elliptical statements quoted above were intended simply to indicate that the effect of the FRCD, where suit was not brought within three years of the discovery-of-injury date, is to allow a plaintiff to bring suit within one year after discovery of the cause of an injury, even if more than five years have elapsed since discovery of the injury. We see no indication that the district court applied a different principle.

CONCLUSION

We have considered all of the parties' arguments in support of their respective appeals, and, except as to plaintiffs' contention that genuine issues of material fact precluded the granting of summary judgment, we have found them to be without merit. We vacate the judgment summarily dismissing the claims at issue on this appeal, and we remand for proceedings not inconsistent with this opinion.

Costs to plaintiffs.

CONCUR BY: LEVAL

CONCUR:
LEVAL, J., concurring:

I concur with the majority's opinion. I agree with the majority that "Section 214-c, as modified by the FRCD, gives the plaintiff one year from the date of discovery of the cause of the injury to commence a lawsuit (or three years from the date of discovery of the injury, if longer) and that provision satisfies the requirements of the FRCD."

I write separately to note only that, in my view, the scientific knowledge proviso of § 214-c(4) is incompatible with the FRCD, and that the majority's discussion of the various possible meanings of the proviso is therefore superfluous.

The New York statute purports to establish different accrual dates for claims of personal injury caused by hazardous substances. Section 214-c(2) specifies plaintiff's discovery of the injury as the accrual date (and allows a plaintiff three years from that date). This accrual date is illegal under the FRCD because it commences at a date earlier than the "the

date the plaintiff knew (or reasonably should have known)" the cause of injury. *See* 42 U.S.C. § 9658(b)(4)(A). Section 214-c(4), on the other hand, specifies the plaintiff's "discovery of the cause of the injury" as the accrual date (and allows one year). This provision is lawful under the FRCD because its accrual date occurs no earlier than the date the plaintiff knew or reasonably should have known the cause of the injury.

However, under the literal terms of the New York statute, § 214-c(4)'s discovery-of-cause accrual date is not always available to plaintiffs. To qualify for this accrual date, a plaintiff must satisfy two conditions. First, the discovery of the cause of injury must have occurred less than five years after discovery of the injury. If a plaintiff fails to satisfy this requirement, the timeliness of his suit is judged under § 214-c(2). The latter section, however, utilizes an accrual date that is illegal under the FRCD. Accordingly, our opinion makes clear that the district court correctly nullified the 5-year limitation. Because of the impact of the FRCD, a plaintiff may bring his suit under § 214-c(4) within one year of discovery of the cause of injury, regardless whether this occurred within 5 years of the discovery of the injury.

The second hurdle a plaintiff must clear in order to use § 214-c(4)'s discovery-of-cause accrual date is the scientific knowledge proviso. It requires a showing that "technical, scientific or medical knowledge and information sufficient to ascertain the cause of his injury had not been discovered, identified or determined" within three years of discovering the injury. A plaintiff who fails to make this showing is similarly relegated to the limitation period established in § 214-c(2). As noted, however, § 214-c(2)'s limitation period is unlawful because it uses an accrual date earlier than the earliest accrual date allowed by the federal statute.

The only function the scientific knowledge proviso can serve is to disqualify a plaintiff from using the lawful accrual date established by § 214-c(4), requiring the plaintiff's timeliness to be judged by the unlawful terms of § 214-c(2). The scientific knowledge proviso, like the condition requiring the discovery of cause to be within five years of the discovery of injury, cannot function lawfully; it is therefore preempted by the FRCD and must be disregarded. Accordingly, in my view the majority opinion's discussion of the different possible interpretations of the scientific knowledge proviso is superfluous and moot.

The majority opinion recognizes this problem when it states, "To the extent . . . that the scientific-knowledge provision of CPLR § 214-c(4) imposes an accrual date earlier than the date on which the plaintiff knew or reasonably should have known the cause of the injury, it is . . . preempted by the FRCD." But if the only function of the scientific knowledge proviso is to disqualify a plaintiff from using § 214-c(4)'s lawful accrual date, thereby forcing him to use the unlawful date of § 214-c(2), then the proviso cannot survive, and a debate over the different meanings the New York legislature may have intended has no useful application.

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK

IN RE: PFOHL BROTHERS LANDFILL LITIGATION;
THIS DOCUMENT RELATES TO ALL ACTIONS

95-CV-0020A(F)

26 F. Supp. 2d 512

October 27, 1998, Decided
October 27, 1998, Filed

COUNSEL:
Baron & Budd, P.C. (Frederick M. Baron, of counsel), Dallas, TX, Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria LLP (Laraine Kelley, of counsel), Buffalo, NY, for Plaintiffs.

Nixon, Hargrave, Devans & Doyle LLP (Laurie Styka Bloom, of counsel), Buffalo, NY, for Liason Group Defendants.

ORDER

ARCARA, District Judge.

This case was referred to Magistrate Judge Leslie G. Foschio, pursuant to 28 U.S.C. § 636(b)(1), on February 16, 1996. On June 10, 1997, defendants filed a motion for partial summary judgment. On March 11, 1998, Magistrate Judge Foschio filed a Report and Recommendation, recommending that: (1) defendants' motion for partial summary judgment be granted

in part and that the survival actions pertaining to decedents Anthony J. Marino, Isabelle A. Wiedenbeck and Joseph J. Wiedenbeck be dismissed; (2) summary judgment be denied as to the survival actions of Mary Jane Farino, Robert L. Farino, Stephen C. Grandillo, Nelson M. Hirsch, Henry A. Kuczka, George Pagels and Leo N. Phillips; (3) the survival and wrongful death actions commenced on behalf of Evo T. Astor, Charles W. Batt, Rose E. Batt, Loraine E. Brezezicki, Gretchen A. Heaney, Joseph A. Inzinnia, Robert A. Martzolf, Vincent J. Mongiovi, Alfred G. Mucha and Mary M. Sturm, decedents for whom no personal representative had been duly appointed prior the action being filed, be dismissed with leave to renew; (4) summary judgment as to the remaining wrongful death actions be denied; (5) summary judgment as to the punitive damages claims be granted in part and denied in part; and (6) summary judgment as to the claims for loss of consortium be denied.

On April 24, 1998, plaintiffs Irene M. Marino and Joseph J. Wiedenbeck filed objections to the Report and Recommendation. Defendants also filed objections to the Report and Recommendation on April 24, 1998. Oral argument on the objections was held on September 20, 1998.

Pursuant to 28 U.S.C. § 636(b)(1), this Court must make a de novo determination of those portions of the Report and Recommendation to which objections have been made. Upon a de novo review of the Report and Recommendation, and after reviewing the submissions and hearing argument from the parties, the Court adopts the proposed findings of the Report and Recommendation.

Accordingly, for the reasons set forth in Magistrate Judge Foschio's Report and Recommendation: (1) defendants' motion for partial summary judgment is granted in part and the survival actions pertaining to decedents Anthony J.

Marino, Isabelle A. Wiedenbeck and Joseph J. Wiedenbeck are dismissed; (2) summary judgment is denied as to the survival actions of Mary Jane Farino, Robert L. Farino, Stephen C. Grandillo, Nelson M. Hursch, Henry A. Kuczka, George Pagels and Leo N. Phillips; (3) the survival and wrongful death actions commenced on behalf of Evo T. Astor, Charles W. Batt, Rose E. Batt, Loraine E. Brezezicki, Gretchen A. Heaney, Joseph A. Inzinnia, Robert A. Martzolf, Vincent J. Mongiovi, Alfred G. Mucha and Mary M. Sturm, decedents for whom no personal representative had been duly appointed prior to the action being filed, are dismissed with leave to renew; (4) summary judgment as to the remaining wrongful death actions is denied; (5) summary judgment as to the punitive damages claims is granted in part and denied in part; and (6) summary judgment as to the claims for loss of consortium is denied.

This case is referred back to Magistrate Judge Foschio for further proceedings.

IT IS SO ORDERED.

REPORT AND RECOMMENDATION

FOSCHIO, United States Magistrate Judge

JURISDICTION

This case was referred to the undersigned by the Honorable Richard J. Arcara on February 16, 1996, for report and recommendation on all dispositive motions. It is presently before the court on Defendants' motion for partial summary judgment (Doc. # 288), filed June 10, 1997.

BACKGROUND

This action was commenced on January 10, 1995, by the filing of the first of seven essentially identical complaints on behalf of sixty-seven plaintiffs, suing on behalf of themselves or their respective decedents, in which Plaintiffs seek monetary damages including punitive damages from Defendants for injuries or deaths various cancers which they contend were caused by exposure to hazardous and toxic substances from the Pfohl Brothers Landfill located in Cheektowaga, New York (the "Landfill").[1] The death actions

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[1] Originally assigned to Hon. John T. Elfvin, this matter was transferred to Hon. Richard J. Arcara by order dated October 15, 1995. Judge Arcara, by order dated February 16, 1996, consolidated these actions for all pre-trial purposes. That order was also made applicable to any future related cases. As no discovery regarding the timeliness of the claims in the latest action *Anthony v. Westinghouse*, No. 97-CV-977A(F), had taken place as of the filing of the instant motion, Defendants here seek summary dismissal only as to the motions brought regarding the decedents in the first five actions, specifically (1) *Frier v. Westinghouse*, No. 95-CV-20A(F), which covers the claims pertaining to decedents Mary Jane Farino, Robert L. Farino, Joseph A. Inzinna and Leo N. Phillips were filed, (2) *Batt v. Westinghouse*, No. 95-CV-107A(F), which covers the claims of decedents Charles W. Batt, Rose E. Batt, Stephen C. Grandillo, Henry A. Kuczka, Vincent J. Mongiovi and George Pagel, (3) *Astor v. Westinghouse*, No. 95-CV-247A(F), which covers the claims pertaining to the decedents Lorraine R. Brzezicki, Robert A. Martzolf, Alfred G. Mucha and Mary M. Sturm, (4) *Davies v. Westinghouse*, No. 95-CV-444A(F), which covers the claims of decedents Evo T. Astor and Gretchen A. Heaney, and (5) *Fiels v. Westinghouse*, No. 96-CV-395A(F), which covers the claims of Nelson M. Hirsch. Anthony J. Marino, Isabelle

(Footnote continued on next page)

were filed by the widows, widowers, children or estate representatives of decedents. Plaintiffs allege that they or their decedents lived, worked or engaged in recreational activity in the vicinity of the Landfill and that Defendants either owned and operated the Landfill or were otherwise responsible for the generation or transportation of the hazardous substances to the Landfill. Plaintiffs' claims are based on state law negligence, strict liability, gross negligence, loss of consortium, and wrongful death.

The instant motion seeks summary dismissal of the survival actions and wrongful death claims asserted on behalf of twenty decedents, most of which would be time-barred under New York law. Plaintiffs urge that these claims are timely under the provision of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601 *et seq.*, ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), 100 Stat. 1613, specifically, § 309, 42 U.S.C. § 9658, which preempts the accrual date for state law toxic tort actions based on exposure to hazardous substances released into the environment by facilities as defined by CERCLA, permitting such claims to accrue upon the discovery of the cause of the injury.[2] Defendants maintain that CERCLA

(Footnote continued from previous page)

A. Wiedenbeck and Joseph J. Wiedenbeck, Sr. Defendants' Memorandum of Law in Support of Consolidated Motion for Partial Summary Judgment (Doc. # 290), filed June 10, 1997, at 2 n. 2 and 3. Each of these complaints has since been amended to correct the names of some defendants, but the causes of action asserted by each plaintiff have remained the same.

[2] For convenience, the court refers to an action based on an exposure to an alleged hazardous substance as a "toxic tort."

provision is inapplicable to the instant claims or that it is unconstitutional.

On February 16, 1996, Defendants were granted a period of discovery limited to their statute of limitations defense. On June 11, 1997, Defendants filed a motion for partial summary judgment seeking dismissal of the survival and wrongful death actions on behalf of twenty decedents and the consortium claims on behalf of eight surviving spouses as time-barred under the applicable New York statutes of limitations and challenging the applicability and constitutionality of 42 U.S.C. § 9658.[3] Plaintiffs responded on July 11, 1997 and Defendants replied on July 25, 1997. Oral argument was deemed unnecessary.

For the reasons which follow, Defendants' motion for partial summary judgment should be GRANTED in part, and DENIED in part.

FACTS[4]

The 120 acre Pfohl Brothers Landfill ("the Landfill"), located in the northeastern corner of the town of Cheektowaga, New York, a suburban area adjacent to the City of Buffalo, is

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[3] As required by 28 U.S.C. § 2403(a), the court certified on November 6, 1997, to the Attorney General that Defendants have challenged the constitutionality of 42 U.S.C. § 9658, and permitted the Attorney General to intervene on behalf of the United States by filing an application to intervene within twenty days of receipt of such notice. To date, no such application has been filed and the court proceeds on the basis that the United States has waived its right to intervene

[4] The fact statement is taken from the complaints, answers, and other papers filed in this action.

listed on the New York State Registry of Active Hazardous Waste Disposal Sites, indicating that the state considers the Landfill to be a public health threat. Many industrial wastes including hazardous substances were deposited into the Landfill between 1932 and 1969. Aero Lake is adjacent to the northwestern corner of the Landfill. Ellicott Creek runs within a few hundred feet of the Landfill and is fed by three tributaries which flow through the Landfill. Ellicott Creek empties into the Niagara River, an international waterway flowing between the United States and Canada.

Plaintiffs in this action have filed claims based on state law negligence, strict liability, gross negligence, loss of consortium, and wrongful death for injuries or deaths to their respective decedents whose deaths they contend were caused by exposure to hazardous and toxic substances in the Landfill. Defendants are the alleged owners and operators of the Landfill; the Third-Party Defendants assertedly generated and transported the hazardous and toxic substances to the Landfill.[5] According to Plaintiffs, Defendants' negligence is based upon Defendants' failure to take adequate precautionary measures to properly contain and prevent the hazardous substances deposited into the Landfill from escaping and migrating out of the Landfill and its surrounding area where Plaintiffs and their decedents resided. Plaintiffs allege exposure occurred through contact with the ambient air and ground water when their decedents lived, worked or engaged in recreational activity in the vicinity of the Landfill.

Among the toxic substances allegedly deposited in the Landfill are polychlorinated biphenol ("PCB") oils, acetone,

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[5] Unless indicated otherwise, references herein to Defendants include the Third-Party Defendants.

trichloroethane, 3-tricloroethane, perchloroethylene, trichloroethylene, tetrachloroephylene, coolant oil, paint treatment, waste cutting oils, degreasing materials, hydraulic oil, waste paint, industrial wastes, fluorinated solvent waste, cobalt, mercury, toluene, vinyl toluene, benzene, xylene, methylene fluoride, lead, lead driers, calcium, cadmium, zinc oxide, curing sulfur, dry metal dust, sand blast grit, foundry wastes, pine tar pitch, pickling solutions, titanium tetrachloride, polyvinyl alcohol film wastes, polyvinyl chloride, naptha, mek, waste inks, heavy metal wastes, paint thinners, paint solvents, industrial solvents, zirconium sludge, phenolic sludges, and paint sludges such as zinc, tin, chrome, iron, nickel, copper, asbestos, phenol, and fly ash.

Defendants who operated manufacturing facilities within the Western New York region and who it is alleged negligently released and disposed of hazardous substances into the Landfill include Westinghouse Electric Corporation during the years 1946 through 1969, General Motors Corporation from the 1950's through 1968, Curtiss-Wright Corporation during the years 1947 through 1966, W.S. Tyler, Incorporated, as successor in interest to Hewitt-Robbins Corp., during the 1950's and 1960's, Laidlaw Waste Systems, Inc., individually, and as successor in interest to U.S. Rubber Reclaiming Co., Inc., during the 1950's and 1960's, Warner Lambert Company, through its subsidiary American Optical, during the 1950's and 1960's, American Standard, Inc., during the 1950's and 1960's. Howden Fan Company, during the 1950's and 1960's, Carborundum Company for the time period 1951 through 1967, E.I. Dupont deNemours, from 1955 through 1968, F.N. Burt Co. from 1959 through 1969, and Litton Industries, Inc., as successor in interest to Hewitt Robbins Corp., during the late 1950's through the 1960's.

Defendants who it is alleged negligently transported and deposited hazardous substances into the Landfill include

Waste Management, Inc., through its predecessor, Downing Container Services, from 1952 through the 1960's, Browning-Ferris Industries, Inc., as successor in interests to Joe Ball Sanitation Services, Inc., Rapid Disposal Services, Inc., and Niagara Sanitation Company, Inc., during the 1950's and 1960's, and Dresser Industries, Inc., during the 1950's and 1960's.

The instant motion seeks summary dismissal of the survival actions and wrongful death claims asserted as to twenty decedents, specifically Evo T. Astor, Charles W. Batt. Rose E. Batt, Lorraine R. Brzezicki, Mary Jane Farino, Robert L. Farino, Stephen C. Grandillo, Gretchen A. Heaney, Nelson M. Hirsch, Joseph A. Inzinna, Henry A. Kuczka, Anthony J. Marino, Robert A. Martzolf, Vincent J. Mongiovi, Alfred G. Mucha, George Pagels, Leo N. Phillips, Mary M. Sturm, Isabelle A. Wiedenbeck and Joseph J. Wiedenbeck, Sr.[6] Dismissal of claims for loss of consortium brought in connection with the deaths of Astor, Kuczka, Marino,

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[6] In New York, damages recovered in a survival action are based on pre-death personal injury and become part of the decedent's estate to be distributed in accordance with the decedent's will or by the laws of intestacy. N.Y. Est. Powers & Trusts Law § 11-3.3(a)(McKinney 1967). Damages in wrongful death actions are recoverable based on pecuniary losses and do not become part of the decedent's estate, but rather are distributed directly to those who demonstrate financial dependence on the decedent. N.Y. Est. Powers & Trust Law § 5-4.4(a)(McKinney 1997). In New York, such beneficiaries include those who would be the decedent's distributees pursuant to the rules governing intestate succession, in proportion to the pecuniary damages suffered by each such distributee. N.Y. Est. Powers & Trust Law §§ 5-4.4 and 5-4.5. (McKinney 1991).

Martzolf, Mongiovi, Mucha, Pagels and Phillips is also sought.

DISCUSSION

Summary judgment of a claim or defense will be granted when the moving party demonstrates that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a) and (b); *Celotex Corp. v. Catrett*, 477 U.S. 317, 331, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Rattner v. Netburn*, 930 F.2d 204, 209 (2d Cir. 1991). The moving party for summary judgment bears the burden of establishing the nonexistence of genuine issue of material fact. If there is any evidence in the record based upon any source from which a reasonable inference in the nonmoving party's favor may be drawn, the moving party cannot obtain a summary judgment. *Celotex, supra*, 477 U.S. at 331.

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no issue as to any material fact, and the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson. supra*, 477 U.S. at 247-48.

Defendants have moved for partial summary judgment seeking dismissal of the claims of twenty decedents and eight surviving spouses on statute of limitations grounds, arguing such claims are time-barred because 42 U.S.C. § 9658 does not apply to the asserted causes of action, and, alternatively,

that the statute is unconstitutional as it constitutes legislation beyond the scope of congressional power under the Commerce Clause and violates the Tenth Amendment of the United States Constitution. Defendants also seek dismissal under New York law of all survival and wrongful death actions which were commenced without a duly appointed personal representative. Defendants further assert that Plaintiffs' loss of consortium claims must be dismissed as they are derivative of the underlying survival actions on which they are based and therefore are also time-barred. Finally, Defendants argue that the claims for punitive damages must be dismissed as such claims are both legally insufficient and their timeliness is dependent on the underlying time-barred wrongful death, survival actions, and loss of consortium claims.

The court will therefore first determine whether Plaintiffs' claims are time-barred under relevant state law and if so, whether 42 U.S.C. § 9658 is applicable and, to the extent applicable, its preemptive effect on New York law. If the state law is preempted, the court will determine the constitutionality of 42 U.S.C. § 9658. Finally, the court will address whether Defendants' arguments regarding Plaintiffs' failure to have properly appointed representatives requires dismissal and whether Plaintiffs' loss of consortium and punitive damages claims may proceed.

1. Statute of Limitations

The timeliness of a claim in federal court under diversity jurisdiction, 28 U.S.C. § 1332(a), is governed by the statute of limitations for the state in which the court sits. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109-110, 89 L. Ed. 2079, 65 S. Ct. 1464 (1945); *Personis v. Oiler*, 889 F.2d 424 (2d Cir. 1989). Accordingly, the court's analysis begins with an examination of the statutes of limitations governing the

timeliness of survival and wrongful death actions in New York which reveals that, in the instant case, most of Plaintiffs' claims are time-barred under the applicable New York state statutes of limitations.

a. The Timeliness of Plaintiffs' Claims under New York Law

1. Survival Actions

In New York the traditional limitations period for personal injury torts, including survival actions, based on negligence, strict liability, gross negligence and loss of consortium is three years measured from the date of the injury, defined in toxic tort cases as the date of first exposure to the toxic substance.[7] N.Y. Civ. Prac. L. & R. § 214(5) (McKinney, 1990)("§ 214(5)"). Here, Plaintiffs seek recovery for their decedents' injuries based on exposure to toxic substances that

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[7] When New York's traditional limitations period commenced to run with regard to toxic tort actions has sometimes been misstated. *See, e.g., Kulzer v. Pittsburgh-Corning Corp.*, 942 F.2d 122, 126 (2d Cir. 1991)("at the time, a cause of action for exposure to toxic substances accrued on the last date of exposure to the toxic substances")(applying New York caselaw). However, the New York Court of Appeals recently affirmed that under the traditional New York rule the limitations period for toxic torts accrued as of the date of first, not last exposure. *Blanco v. American Telephone and Telegraph Co.*, 90 N.Y.2d 757, 689 N.E.2d 506, 666 N.Y.S.2d 536, 1997 WL 729116. *3 (N.Y. 1997)("Prior to enactment of CPLR 214-c, this Court has held that in the case of latent injuries arising out of exposure to toxic substances, the cause of action accrued upon plaintiff's initial exposure")(emphasis added).

first occurred between the early 1900's, Records of Leo N. Phillips, attached as Exhibit 1 to Affidavit of Laurie Styka Bloom, Esq., in Support of Liaison Group Defendants' Consolidated Motion for Partial Summary Judgment (Doc. # 291)("Bloom Affidavit"), filed June 10, 1997, and the late 1960's. Records of Henry A. Kuczka, Bloom Affidavit, Exhibit 9. All the instant actions are thus untimely under § 214(5) as more than three years have passed since the date of first exposure to the alleged toxic substances and the filing of the claims by decedents' representatives in 1995 and 1996.

In response to complaints that the first exposure rule, judicially established in *Schmidt v. Merchants Despatch Transp. Co.*, 270 N.Y. 287, 200 N.E. 824 (N.Y. 1936), barred many plaintiffs from commencing actions for injuries caused by latent effects of exposure to toxic chemicals and other hazardous substances before learning they were injured and the causes thereof, in 1986 the New York legislature enacted § 214-c of New York Civil Practice Law and Rules which created special accrual rules and limitations periods allowing more time for plaintiffs to file claims seeking damages for injuries and deaths attributed to exposure to such substances.[8] Section 214-c(2) provides that a plaintiff who suffers a personal injury in a toxic tort case has three years from the date of the discovery of the injury to commence an action. N.Y. Civ. Prac. L. & R. 214-c (2)(McKinney 1990)("§ 214-

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[8] In *Schmidt*, the New York Court of Appeals held that an "injury occurs when there is a wrongful invasion of personal or property rights and then the cause of action accrues. Except in cases of fraud where the statute expressly provides otherwise, the statutory period of limitations begins to run from the time when liability for wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury." *Schmidt*, at 827.

c(2)"). Here, Plaintiffs seek recovery based on injuries to their decedents, the earliest of which was discovered in 1961, Records of Evo T. Astor, Bloom Affidavit, Exhibit 6, and the latest of which was discovered in October 1993. Records of Nelson M. Hirsch, Bloom Affidavit, Exhibit 20.[9] An examination of the relevant exhibits submitted on this motion reveals that, the filing of only Nelson M. Hirsch's survival action on June 17, 1996 was timely under § 214-c(2), assuming that Hirsch's discovery of his injury coincided with the diagnosis of Hirsch's cancer in October 1993. *See* Records of Nelson M. Hirsch, Bloom Affidavit, Exhibit 20.

Further, pursuant to N.Y. Civ. Prac. L. & R. § 214-c (4)(McKinney 1990 & Supp. 1997)("§ 214-c(4)"), if the plaintiff discovers the cause of a toxic tort injury within five years of the discovery of the injury, the plaintiff may invoke the longer of (a) the three year period from the discovery of the injury or (b) a one year period from the discovery of the cause within which to commence an action. Here, all Plaintiffs assert that they discovered the cause of their decedents' injuries in 1994 or 1995. Bloom Affidavit, Exhibits 1-20. As less than five years have passed between the asserted dates of discovery of the decedents' injuries and the discovery of the causes of those injuries only as to the survival actions brought on behalf of the estates of Mary Jane Farino, Nelson M. Hirsch, Isabelle A. Wiedenbeck and Joseph J. Wiedenbeck, Sr., Bloom Affidavit, Exhibits 17, 20, 19 and 16, respectively, only those survival actions meet the first requirement for timeliness under § 214-(c)(4). As stated, with the exception of Hirsch, none of the instant survival

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[9] It is assumed only for the purposes of this Discussion that the diagnosis of each decedent's injury coincided with the discovery of such injury, a fact which has yet to be established by either party.

actions were filed within three years of the discovery of the fatal injuries. Accordingly, the survival actions are timely only if filed within one year of the discovery of the causes of such injuries.

However, as 1994 is the asserted date of discovery of the cause of the injuries pertaining to the survival actions for Isabelle A. and Joseph J. Wiedenbeck Sr., (Bloom Affidavit, Exhibits 16 and 19), and as those survival actions were not filed until June 17, 1996, Case # 96-CV-395A(F)(Docket No. 1), they were not filed within one year of the discovery of the alleged cause of death as required by the statute of limitations period under § 214-c(4), and, as such, are time-barred under New York law, regardless of whether 42 U.S.C. § 9658 applies.[10] The survival action of Mary Jane Farino, filed January 10, 1995 is timely under § 214-c(4), assuming, as Plaintiffs allege, that the cause of Farino's injury was discovered in 1995. Records of Mary Jane Farino, Bloom Affidavit, Exhibit 17. As the asserted date of discovery of the cause of decedent Hirsch's injuries, is "in 1995," depending on the precise date of such discovery, the relevant survival action, filed June 17, 1996, may be timely under § 214-c(4) as well as § 214-c(2). Records of Nelson M. Hirsch, Bloom Affidavit, Exhibit 20. However, even with the benefit of 42 U.S.C. § 9658, the survival action of Nelson M. Hirsch is untimely under § 214-c(4). *See* Discussion, *infra*, at 34-35.

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[10] As discussed, *infra, see* Discussion at 16-17, 42 U.S.C. § 9658 does not affect the applicable state limitations period, only the manner of determining the date of accrual of the claim.

2. Wrongful Death Claims

The applicable statute of limitations for wrongful death actions under New York law is two years measured from the date of death. N.Y. Est. Powers & Trusts Law § 5-4.1 (McKinney 1997). Plaintiffs' wrongful death claims pertain to the deaths of persons who died between 1963 and 1993, Bloom Affidavit, Exhibits 1-20, and Plaintiffs concede that all of the instant wrongful death actions, none of which were filed within two years from any of Plaintiffs' respective decedents' deaths, are untimely under N.Y. Est. Powers & Trusts Law § 5-4.1. Plaintiffs' Memorandum of Law, at 1.

b. The Purpose of the Federally Required Commencement Date

As most of the survival actions and all the wrongful death actions are time-barred under New York law, Plaintiffs assert that the timeliness of their survival and wrongful death claims are governed by 42 U.S.C. § 9658, which neither creates a separate federal cause of action based on toxic torts within its terms nor a uniform statute of limitations related to such torts, but rather provides a uniform accrual date from which the applicable state period of limitations governing such tort actions is measured. 42 U.S.C. § 9658A(4)(b). Defendants argue that as 42 U.S.C. § 9658 refers only to actions for personal injury and property damage it is inapplicable to Plaintiffs' otherwise time-barred survival and wrongful death actions. Liaison Group Defendants' Memorandum of Law in Support of Consolidated Motion for Partial Summary Judgment ("Defendants' Memorandum of Law"), filed June 10, 1997, at 21, 25.

Section 9658 of Title 42 of the United States Code is part of the Comprehensive Environmental Response, Compensation and Liability Act, known as "CERCLA." CERCLA was

enacted in response to the increasing threat to the national environment and public health represented by years of unsafe disposal of hazardous substances. *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 116 S. Ct. 1251, 1254, 134 L. Ed. 2d 121 (1996); *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 514 (2d Cir. 1996). As enacted on December 11, 1980, CERCLA contained many provisions to facilitate the expeditious cleanup of hazardous waste sites and to recover the accompanying costs from the responsible parties. *See* 42 U.S.C. §§ 9601, *et. seq.* For example, in addition to permitting actions by federal and state government agencies to remediate the unsafe storage and release of hazardous substances, 42 U.S.C. § 9613(g), CERCLA also authorizes actions by private individuals to accomplish its objectives. 42 U.S.C. § 9607(a)(4)(B)(private individuals may sue for "any other necessary costs of response incurred by any other person consistent with the national contingency plan"); *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1041-42 (2d Cir. 1985)(CERCLA provides incentive to private parties to take lead role in cleaning up hazardous waste sites).

Congress, however, also had intended that CERCLA provide a legal remedy for private claims based on injuries to persons and property damage attributed to the release of hazardous substances into the environment, although Congress was unable, at the time of CERCLA's enactment in 1980, to agree on the form such legal redress should take. Superfund Section 301(e) Study Group, 97th Cong., 2d Sess., Injuries and Damages from Hazardous Wastes - Analysis and Improvement of Legal Remedies, 16 (Comm. Print 1982)("Study Group Report"). Accordingly, § 301(e) of CERCLA, 42 U.S.C. § 9651(e), mandated that a study be conducted "to determine the adequacy of existing common law and statutory remedies in providing legal redress for harm to man and the environment caused by the release of

hazardous substances into the environment."[11] 42 U.S.C. § 9651(e)(1) (emphasis added). The study also was to particularly address:

(A) the need for revisions in existing statutory or common law, and

(B) whether such revisions should take the form of Federal statutes or the development of a model code which is recommended for adoption by the States.

42 U.S.C. § 9651(e)(4)(A) and (B).

The results of that study were to be delivered to Congress for consideration in amending CERCLA to deal specifically with these questions. 42 U.S.C. § 9651(e)(4). The Study Group filed its report on July 1, 1982. Study Group Report, at 3.

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[11] The term "hazardous substance" is used throughout the CERCLA legislation. 42 U.S.C. § 9601(14). However, the Study Group Report refers to both "hazardous substance" and "hazardous waste" stating "that the definition of 'hazardous waste" or 'hazardous substance' can be different for different purposes," and that "for regulatory purposes, depending on the authorizing statute involved, the regulator may have to determine the risk in the light of the counterbalancing economic benefit resulting from the manufacture and use of the hazardous substance, before and after it becomes hazardous waste." Study Group Report, at 24 (emphasis added). Such language implies that "hazardous waste" is a form of a hazardous substance and, accordingly, use of the term "hazardous substance" in this discussion includes "hazardous waste."

Congress did not, however, adopt any of the Study Group's ten recommendations, which included an administrative claim procedure upon a federally created fund, and enhancement of the states' own statutory remedies to provide for and facilitate the redress of personal injuries and property damage attributed to improper disposal of hazardous substances under 42 U.S.C. § 9651(e)(4)(B). Study Group Report, at 193-271. Instead, Congress responded to the Study Group Report's finding that existing state private tort actions for personal injuries and property damage were effective mechanisms of legal redress, but for the fact that such actions were often time-barred as the relevant state statutes of limitations and related judicial decisions did not permit accrual of an action based on an injury with a long latency period such as cancer to be measured from the discovery of the cause of the injury. Study Group Report, at 21-22, 43. Accordingly, Congress enacted 42 U.S.C. § 9658, providing for a uniform accrual date from which to measure the running of the applicable periods of limitation for state law toxic torts actions.

Specifically, the legislation provides that

> (1) In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute. . ..(2) Except as provided in paragraph (1), the statute of limitations established under State law shall apply in all actions brought under

> State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility.[12]

42 U.S.C. 9658(a)(1) & (2).

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[12] A "facility" is defined by 42 U.S.C. § 9601(9) as "(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel." 42 U.S.C. § 9601(9)(A) and (B). The parties do not dispute that the Landfill comes within this definition. A "release" is defined as "a spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes (A) any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station, (C) release of source, byproduct, or special nuclear material from a nuclear incident . . . and (D) the normal application of fertilizer." 42 U.S.C. § 9601(22). As the instant motion is limited to their statute of limitations defenses, Defendants do not dispute that the alleged hazardous wastes at the Landfill have been released into the environment.

The "federally required commencement date" is defined as

> the date plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) were caused or contributed to by the hazardous substances or pollutant or contaminant concerned.

42 U.S.C. § 9658(b)(4)(A) ("the FRCD").

Defendants assert that the FRCD does not apply to the survival and wrongful death actions because they are not "actions for personal injuries" as that term appears in the FRCD. Plaintiffs maintain that both survival and wrongful death actions are within the ambit of the FRCD and that the FRCD preempts the accrual rule of the New York general statute of limitations and its wrongful death statute, which otherwise bar their claims. Plaintiffs' Response to Defendants' Consolidated Motion for Partial Summary Judgment ("Plaintiffs' Memorandum of Law"), filed July 11, 1997, at 1-2.

A cause of action "accrues" for statutory limitations periods when "the plaintiff has 'a complete and present cause of action.'" *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corporation of California, Inc.*, 522 U.S. 192, 139 L. Ed. 2d 553, 118 S. Ct. 542, 549 (1997). Moreover, "a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." *Bay Area Laundry and Dry Cleaning Fension Trust Fund, supra* (citing *Reiter v. Cooper*, 507 U.S. 258, 267, 122 L. Ed. 2d 604, 113 S. Ct. 1213 (1993)("While it is theoretically possible for a statute to create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit, we will not infer such

an odd result in the absence of any such indication in the statute")). Accordingly, as a plaintiff cannot in good faith file suit to obtain relief until causality is known, *see* Fed.R.Civ.P. 11(b) (requiring that all actions and motions in federal court be made with the reasonable belief that such actions are legally warranted and not made for any improper purpose such as to harass or cause undue delay), an action does not accrue, and hence the relevant statute of limitations does not commence to run, absent knowledge, or a good faith belief as to the existence of each element of the tort including causality.

c. The FRCD Applies to State Survival and Wrongful Death Actions

Defendants, in their effort to demonstrate that the FRCD does not apply to survival or wrongful death actions, contend that the FRCD was not intended to permit knowledge of the cause of action to accrue to one other than the decedent and that construction of the FRCD to permit such accrual is against public policy.[13]

An essential element of both survival and wrongful death actions is that the decedent have died with a viable cause of action against the defendant for the infliction of the injury which caused the death. N.Y. Est. Powers & Trust Law §§ 11-3.2 (survival actions) and 5-4 (wrongful death actions). Here, the asserted FRCD with respect to the claims of each decedent is well *after* the date of death of each decedent whose claims are subject to the instant motion and who presumably died before it was possible to determine the

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[13] Defendants assert further arguments opposing application of the FRCD to wrongful death actions. Those arguments are addressed, *infra*, at 34-49.

causes of the decedents' injuries and resulting deaths. Defendants argue that as the FRCD does not expressly provide that a survival or wrongful death action may accrue upon the discovery of the cause of a decedent's fatal injury by one other than decedent, each decedent thus died without a viable cause of action. Defendants' Memorandum of Law, at 27-28. Defendants further assert that permitting a survival or wrongful death action to accrue as of the decedent's estate representative's discovery of the cause of the injury is against public policy as such would create the possibility of an infinite limitations period, thus unfairly burdening Defendants by forcing them to defend stale claims long after the alleged exposures and deaths. Defendants' Memorandum of Law, at 41; Defendants' Reply Memorandum of Law, at 5-6. The court finds Defendants' arguments are without merit for several reasons.

1. The FRCD Does Not Require That a Decedent Personally Discover the Cause of the Fatal Injury Prior to Death

Defendants oppose application of the FRCD to both survival and wrongful death actions on the basis that "the key requirement for invoking the FRCD statute (each decedent's personal discovery of the cause of his or her injury) is decidedly and admittedly absent in these cases." Defendants' Memorandum of Law at 37-38(emphasis added). Defendants read the FRCD too narrowly. By its terms, the FRCD is the "date plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." 42 U.S.C. § 9658(b)(4)(A)(emphasis added). The issue therefore is one of statutory interpretation: did Congress mean to include only the physically injured person, *i.e.*, the person to who suffered the physical or bodily harm, in the

term "plaintiff" as used in the FRCD, or does the term also include an injured party's legal representative where the injuries result in death before the victim can institute a lawsuit based on his own behalf? For the reasons that follow, the court finds that the latter was Congress' intent.

Where a federal statute is concerned, unless the statute directs otherwise, the terms contained in such federal statute are determined in accordance with federal law. *Urie v. Thompson*, 337 U.S. 163, 174, 93 L. Ed. 1282, 69 S. Ct. 1018 (1949)(holding that definition of "negligence" as used in the Federal Employers' Liability Act, 45 U.S.C. § 51 was to be determined based on federal law). The FRCD is a federal statute and it is axiomatic that "the starting point in every case involving construction of a statute is the language itself." *Landreth Timber Co., v. Landreth*, 471 U.S. 681, 684, 85 L. Ed. 2d 692, 105 S. Ct. 2297 (1985)(*quoting Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756, 44 L. Ed. 2d 539, 95 S. Ct. 1917 (1975)). In interpreting a federal statute the court "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law and to its object and policy." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51, 95 L. Ed. 2d 39, 107 S. Ct. 1549 (1987)(internal citations and quotations omitted)(determining that the legislative intent of ERISA, 29 U.S.C. §§ 1001 *et seq.*, applied to state law claim seeking relief under that federal law). Further, the plain meaning of a statute controls unless "the literal application of the statute will produce a result demonstrably at odds with the intention of its drafters," in which case the legislators' intent rather than the strict language controls. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 73 L. Ed. 2d 973, 102 S. Ct. 3245 (1982).

A "plaintiff" is commonly defined as "a person who brings an action; the party who complains or sues in a civil action and so named in the record. A person who seeks remedial

relief for an injury to rights; it designates a complainant." Black's Law Dictionary, 1150 (6th ed. 1990). A "plaintiff" is also defined as "one who commences a personal action or lawsuit to obtain a remedy for an injury to his rights . . . the complaining party in any litigation including demandants in real actions, the claimant in equity, and the libelant in divorce." Webster's Third New International Dictionary of the English Language Unabridged 1729 (1986). According to Fed.R.Civ.P. 17(a), "every action shall be presented in the name of the real party in interest. An executor [or] administrator . . . may sue in that person's own name without joining the party for whose benefit the action is brought." Fed.R.Civ.P. 17(a). The definition of the real party in interest as the plaintiff and including a representative of an estate has been widely applied in federal courts. *See, e.g., Barrett v. United States*, 689 F.2d 324, 330-32 (2d Cir. 1982)(the estate is a plaintiff for purposes of applying discovery rule to a Federal Tort Claims Act claim); *Estwick v. U.S.Air Shuttle*, 950 F. Supp. 493 (E.D.N.Y. 1996)(executor or administrator of estate of decedent permitted to maintain employment discrimination action on behalf of decedent); *Tyx v. Secretary of Health and Human Services*, 1986 WL 2601 *1 (W.D.N.Y. 1986)(duly appointed administrator of an estate would be the real party in interest to maintain an action on decedent's behalf.).

In *Barrett, supra*, the court permitted the representative of a decedent's estate to bring survival and wrongful death actions on behalf of the decedent who died twenty-two years earlier without ever having obtained personal knowledge of the cause of his fatal injury on the basis that the defendant's concealment of the decedent's true cause of death warranted application of the diligence-discovery accrual standard. The court observed that prior to the defendant's revelation of its actions to the plaintiff representative, the plaintiff had no reason to investigate the possibility that defendant's actions

caused her decedent's death, and that decedent himself died without ever having the opportunity to assert his claims. *Barrett*, at 330-31.

Not only does the plain meaning test indicate that the term "plaintiff" includes a legal representative or beneficiary of the physically injured decedent, but the text of the FRCD as a whole indicates Congress carefully chose its phrasing to produce this broader meaning. It is significant that the term "personal injury," as it appears in the FRCD, is not limited in scope to traditional state law legal terminology as Defendants assert. Defendants' Reply Memorandum of Law, at 2-4. As there is no modifier to the term indicating an intention to exclude a third person, the object of the noun "plaintiff" in the FRCD is simply "the" personal injury or property damage without any additional modifications or restrictions. 42 U.S.C. § 9658(b)(4)(A). Adoption of a narrow construction of the term "plaintiff," limited to the person suffering the physical effects of the exposure as urged by Defendants, would preclude the representative of a decedent's estate from being substituted as the plaintiff where the decedent initiates the toxic tort action during his life, yet dies while the action was pending. Defendants provide no reason to find that Congress intended such a result.

With the discovery rule of the FRCD, the requirement that the decedent have a viable cause of action at death is satisfied although the decedent lacked personal knowledge that he had been injured. The existence of each element of the allegedly tortious conduct occurs at or prior to death regardless of whether the decedent died without knowing he was the victim of the tortious conduct. The question of accrual for purposes of the relevant statute of limitations thus depends on what either the decedent or the representative knew, not solely on what happened to the decedent. Given Congress' intention in enacting legislation which sought to

remedy what it viewed as the out-moded and arbitrary first (or last) exposure rule of accrual and the variants created by the majority of states as a substitute accrual test in toxic tort actions covered by CERCLA, the broader construction of the term "plaintiff" to include a deceased victim's representatives in survival and wrongful death actions within the FRCD is more consistent with Congress' objective in enacting the FRCD to address the "harm to man" caused by exposure to hazardous substances and wastes by expanding the opportunity for legal redress in the courts. 42 U.S.C. § 9651; Study Group Report at 16.

Although, as discussed, state law is not controlling on this issue. Defendants' contention that the awareness of the injury and cause as a prerequisite to a survival action must be acquired by the decedent to accrue an action is also contrary to New York law. For example, in *Rothstein v. Tennessee Gas Pipeline Co.*, 204 A.D.2d 39, 616 N.Y.S.2d 902 (App. Div. 2d Dep't. 1994), *aff'd*, 87 N.Y.2d 90, 661 N.E.2d 146, 637 N.Y.S.2d 674 (N.Y. 1995), the fact that the decedent never personally obtained knowledge of the cause of the injury or even the fact of the injury itself, which was first discovered in exploratory surgery during which decedent died, did not prevent the decedent's widow, as the representative of his estate from filing valid survival and wrongful death actions on behalf of decedent's estate and herself. *Rothstein, supra*, 616 N.Y.S.2d at 903. Thus, even New York's survival or wrongful death action statutes do not require that a decedent die possessed of personal knowledge of the cause of his fatal injury, nor bar commencement of such action where knowledge of the cause accrued only to the representative and beneficiaries of the decedent's estate after death. *See, e.g., Annunziato, v. City of New York*, 224 A.D.2d 31, 647 N.Y.S.2d 850 (App. Div. 2d Dep't. 1996)(implying that where decedents died in 1988 and 1990 without ever personally knowing the cause of their injuries,

and representatives of decedents' estates discovered such causes in 1992, survival action filed in 1993 based on knowledge of representatives may be timely under N.Y. Civ. Prac. L. & R. § 214-c(4)); *Greene v. Abbott Laboratories*, 148 A.D.2d 403, 539 N.Y.S.2d 351 (App. Div. 1st Dep't. 1989)(recognizing that action may accrue for purposes of § 214-c upon discovery of cause of injury by one other than decedent). Accordingly, the fact that the decedent did not personally discover the cause of his fatal injury prior to death does not preclude maintenance of a survival or wrongful death action by the representative of a decedent's estate.

2. Public Policy Supports Application of the FRCD to Survival and Wrongful Death Actions

Defendants maintain that to avoid the creation of an open-ended statute of limitations for toxic torts, public policy argues against a construction of the FRCD that modifies the applicable New York statute of limitations by measuring its accrual date from the discovery of the decedent's cause of injury by someone other than the decedent. Defendants' Memorandum of Law, at 41; Liaison Group Defendants' Reply Memorandum of Law in Support of Consolidated Motion for Partial Summary Judgment ("Defendants' Reply Memorandum of Law"), at 5. In Defendants' view, potential defendants in toxic tort cases would be unfairly burdened with defending old claims in situations where the information establishing injury and cause may be handed from one legal representative who may resign, to a new representative, Defendants' Memorandum of Law, at 41, or by collusion of a decedent's descendants to manipulate the running of the statute of limitations by selecting as an estate representative one who had only recently discovered the cause of an injury, despite the earlier knowledge of such cause by other heirs. Defendants' Reply Memorandum of Law, at 6. Defendants also complain that none of the Plaintiffs suing in a

representative capacity can know or prove that their decedents had not discovered the cause of their injuries prior to their respective deaths, triggering the limitations period under § 214-c(4). Defendants' Reply Memorandum of Law, at 6.

Such arguments cannot be sustained under careful scrutiny because they overlook the fact that the FRCD is defined as "the date plaintiff knew (or reasonably should have known)" the cause of the personal injuries. 42 U.S.C. § 9658(b)(4)(A). Such factual knowledge will therefore be attributed to either the decedent or his representative. In New York, for example, if the information was reasonably available for either the decedent or for one prospective estate representative to discover the cause of the decedent's injury, the applicable limitations statutes are read as imputing such information to all prospective estate representatives, who are then presumed to have constructive knowledge of the facts upon which such cause is based. *See Wetherill v. Eli Lilly & Company,* 89 N.Y.2d 506, 678 N.E.2d 474, 655 N.Y.S.2d 862 (N.Y. 1997)(finding that as nothing in the history of § 214-c suggests that the New York Legislature intended to make the running of the applicable statute of limitations dependent on a plaintiff's subjective knowledge of the cause of his condition and that knowledge of the cause of a toxic tort injury may be imputed to a plaintiff once the technical knowledge of the scientific and medical communities exists to establish the cause of such injury); *Annunziato, supra.* Thus, once any legal representative, *i.e.*, a plaintiff, is cast with the discovery contemplated by the FRCD, such fact cannot be escaped by any succeeding representative. Defendants' opposition also fails to address the practical fact that such a representative acting as a plaintiff has no interest in delaying suit as such delay would only serve to increase the burdens of establishing already difficult issues of causality.

An additional answer to Defendants' fear of endless exposure to suit under the FRCD is that the FRCD does not displace a state's prerequisites to suit. For example, in New York once sufficient information is available to establish the FRCD for a claim, failure to name the personal representative of an estate will not prevent the running of the statute for such claim. *See Baez v. New York City Health and Hospitals Corp.*, 80 N.Y.2d 571, 607 N.E.2d 787, 788, 592 N.Y.S.2d 640 (N.Y. 1992)(holding statute of limitations not tolled based on infancy where will designated plaintiff as executor of estate and such plaintiff could have timely sought appointment as personal representative of decedent's estate to commence action on infant's behalf). Such a tolling of the FRCD would result in an overly generous accrual mechanism not found elsewhere within New York law and the FRCD by its terms does not displace such prerequisites. This finding comports with general state rules providing that where an injured party dies knowing the cause of his injury, but before the applicable statute of limitations had expired, the survival action may be commenced if a representative of the estate is timely appointed and the action timely commenced, *i.e.*, within the three year limitations period under § 214-c(2). Revival was not recognized at common law, *Seeley v. Dallao Restaurant*, 238 A.D.2d 497, 656 N.Y.S.2d 679 (App. Div. 2d Dep't. 1997)(holding that personal injury action sounding in common law negligence should not have been reinstated under revival provision of a statute, N.Y. Gen. Mun. Law § 205-e(2)(McKinney 1997)). The court finds no indication in the language or context of the FRCD supporting an interpretation that where a decedent dies possessed of the knowledge contemplated by the FRCD, Congress intended to revive a toxic tort claim that was extinguished by death without timely appointment of a representative within the applicable period of limitations to timely file such claim. The FRCD expresses no intent to revive such claims where such a

failure to comply with state law occurred. *Compare* New York one year window for filing time-barred claims under revival laws involving specified toxins or hazardous devices: 1986 N.Y. Laws ch. 682, §§ 4,12 (diethylstilbrestrol, tungsten-carbide, asbestos, chlordane and polyvinylchloride);[14] 1993 N.Y. Laws ch. 419, § 1 (silicone breast implants and Dalkon shields).

Defendants also argue that permitting a decedent's representative to use the discovery accrual rule in a toxic tort case and bring survival or wrongful death claims could create an "absurd result" whereby a distant descendant, upon discovery of the causes of his ancestor's injury, could timely commence suit generations after the death of the decedent. Defendants' Reply Memorandum of Law, at 5-6. But the passing of significant time between death and the commencement of an action is not, in itself, absurd. In fact, several courts have applied the discovery rule in toxic tort cases, permitting survival actions and wrongful death cases to be maintained by the representative of an estate where the decedent never learned of the cause of the fatal injury. *Barrett, supra; Rothstein, supra; White v. Johns-Manville*

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[14] The court notes that polyvinylchloride was asserted as a toxic substance deposited into the Landfill by E.I. Dupont deNemours in the action commenced by the complaint filed in 96-CV-395E(F). However, as that complaint was filed beyond the one year window, the revival law does not affect the claims contained therein. The court has further determined that three of the four decedents on whose behalf actions were filed in that case, specifically, Anthony J. Marino, and Isabelle A. and Joseph J. Wiedenbeck are time-barred. *see* Discussion, *infra*, at 35-36, and the timeliness of such claim pertaining to the fourth decedent, Nelson M. Hirsch, does not depend on the revival law.

Corp., 103 Wash. 2d 344, 693 P.2d 687 (Wash. 1985)(survival and wrongful death actions); *See, generally*, Judy E. Zelin, J.D., Annotation, *Time of Discovery as Affecting Running of Statute of Limitations in Wrongful Death Action*, 49 A.L.R.4th 972, §§ 4,5 and 8 (1986)(wrongful death actions). As discussed, using New York law as an example, despite potentially long periods of time passing since exposure to a toxic substance, an action including a survival action may still be timely commenced provided it is filed within three years of the discovery of the resulting injury. § 214-c(2).

As to wrongful death actions, in New York such actions may be maintained only by a distributee of decedent, defined as one who is entitled to intestate rights in a decedent's estate, N.Y. Est. Powers & Trusts Law § 1-2.5 (McKinney 1981). Contrary to Defendants' fear of unending liability if the FRCD is applied to wrongful death actions, it has long been the law in New York that the death of such distributee results in abatement of a wrongful death action where no action was commenced by the decedent's distributee during life, and such deceased plaintiff is not survived by another distributee of the first decedent. *See Hernandez v. New York City Health and Hospitals Corp.*, 78 N.Y.2d 687, 585 N.E.2d 822, 825, 578 N.Y.S.2d 510 (N.Y. 1991)(citing *Meekin v. Brooklyn Heights R. Co.*, 164 N.Y. 145, 58 N.E. 50 (N.Y. 1900)(wrongful death action brought by father as distributee of deceased daughter would have abated upon death of father absent existence of other distributees of daughter)). Thus, the potential toxic tort action cannot continue beyond the lifetime of a decedent's distributees alive at the decedent's death.

Refusing to recognize the FRCD's effect in preserving the right of a representative or beneficiary of a decedent's estate to pursue a survival or wrongful death action based on a toxic

exposure also creates an anomaly when compared to the fact that under CERCLA a former owner of real property may be held liable for the costs of removal and cleanup of hazardous substances deposited onto that property while the owner was in fee regardless of how much time has elapsed and that the property may have since been sold or transferred. 42 U.S.C. 9607(a). Moreover, accepting Defendants' argument that the FRCD does not pertain to survival and wrongful death actions results in an incongruity where a hazardous substance causes property damage claims which, in New York, survive a decedent's death and may be brought by the representative of the decedent's estate. N.Y. Est. Power & Trust Law § 11-3.2(b)(McKinney 1997). Additionally, such action accrues under the FRCD upon the discovery that real property has been contaminated by hazardous substances or waste, despite the lapse of time since such substance or waste was released into the environment and the lack of knowledge of the potential claim by the decedent owner. As the FRCD applies to the property damage claim, the discovery of the cause of the damage by the representative of the estate would accrue the action for statute of limitations purposes. Acceptance of Defendants' exclusion of survival and wrongful death actions from the FRCD results in more beneficial treatment of property damage claims than for toxic torts involving people.

The court thus finds that no public policy considerations would be impaired by a construction of the FRCD under which survival and wrongful death actions may be maintained where knowledge of the cause of the decedent's injuries accrues to the representative of the estate after decedent's death. Nor does such finding create, as posited by Defendants, an open-ended statute of limitations for potential toxic tort defendants in cases where toxic tort victims have died. Most significantly, as discussed, the plain meaning of Congress' use of the term plaintiff between the FRCD and its context supports this interpretation and avoids any

inconsistency in the treatment of property damage claims and harm to human beings in such cases.

In the case at bar, all the instant claims, with the possible exception of the survival action of Mary Jane Farino and the survival and wrongful death actions on behalf of Nelson M. Hirsch, are barred under New York law.[15] Accordingly, it is necessary to examine the effect of the FRCD on the viability of the instant survival and wrongful death claims other than for these Plaintiffs.

d. The FRCD's Effect on Plaintiffs' Survival Actions under New York Law

A survival action is an action for injury to a decedent's person or property which survives and may be maintained by the representative of decedent's estate, on behalf of the decedent. N.Y. Est. Powers & Trust Law §§ 11-3.1 and 11-3.2(b)(McKinney 1997); *Ratka v. St. Francis Hospital*, 44 N.Y.2d 604, 378 N.E.2d 1027, 1030, 407 N.Y.S.2d 458 (N.Y. 1978). Any damages recovered in such action belong to the decedent's estate and are distributed in accordance with decedent's will or the laws of intestacy. N.Y. Est. Powers & Trust Law § 11-3.3(McKinney 1967).

It remains the law that personal injury actions in New York are subject to a three year period of limitations measured from the date of the infliction of the injury. N.Y. Civ. Prac. L. & R. § 214(5) (McKinney 1990). In the case of toxic torts, the date of first exposure to the hazardous substance would

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[15] The court notes that although Defendants were given the opportunity, Defendants have not presented any factual basis in connection with this motion to establish the correct FRCD with regard to the claims pertaining to these decedents.

be the infliction of the injury under § 214(5). *Schmidt, supra.* However, under the discovery rule, § 214-c(2), enacted in 1986, a three year statute of limitations applies to actions in which recovery is sought "for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances," measured from the date of the discovery of the injury or damage. N.Y. Civ. Prac. L. & R. § 214-c(2)(McKinney 1990). Additionally, where the prospective plaintiff discovers his injury but is unaware of the cause until more than three years after discovery of such injury, thus rendering the action untimely under § 214-c(2), an action may still be timely if commenced within the one year limitations period under § 214-c(4), measured from the discovery of the cause of the injury or damage provided that the plaintiff establishes "that the state of medical or scientific knowledge was such that causation of his injury could not have been identified within the three-year period prescribed [under § 214-c(2)]." Practice Commentary to N.Y. Civ. Prac. L. & R. § 214-c(4), p. 634-35 (McKinney 1990).

A transitional rule, N.Y. Civ. Prac. L. & R. § 214-c(6)(McKinney 1990)("§ 214-c(6)"), further provides that the new toxic tort accrual and limitations rules shall be applicable to acts, omissions or failures occurring prior to, on or after July first, nineteen hundred eighty-six, except that this section shall not be applicable to any act, omission or failure:

(a) which occurred prior to July first, nineteen hundred eighty-six, and

(b) which caused or contributed to an injury that either was discovered or through the exercise of reasonable diligence should have been discovered prior to such date, and

(c) an action for which was or would have been barred because the applicable period of limitations had expired prior to such date.

N.Y. Civ. Prac. L. & R. § 214-c(6).

A clear reading of § 214-c(6) indicates that toxic tort actions which meet all three enumerated criteria thereunder, are not given the benefit of the longer toxic tort limitations periods as provided for by §§ 214-c(2) and (4). The FRCD, however, is retroactively applicable to *actions brought after December 11, 1980*, the date of CERCLA's enactment.[16] CERCLA, Title II, § 203(b), 100 Stat. 1696. The FRCD thus preserved any claims for which the cause of the injury had yet to be discovered as of December 11, 1980. *See Kowalski v. Goodyear Tire and Rubber Co.*, 841 F. Supp. 104, 108 (W.D.N.Y. 1994)(holding toxic tort action filed in 1992 timely under § 214-c given the preemptive effect of the FRCD where exposure occurred over twenty-five year period, cancer was diagnosed in 1984, but the cause was not determined until 1990). As the instant claims were all commenced in either 1995 or 1996, assuming the cause of such injuries was discovered, as asserted, in 1994 or 1995, the claims would not have been barred under the FRCD. Thus, the claims do not fall within the third criteria under § 214-c(6), and thereby gain the benefit of the longer accrual rules based on discovery, available under § 214-c.

Where federal law preempts state law it does so only to the extent that the state law is inconsistent with the federal law. *See Aetna Life Insurance Co. v. Borges*, 869 F.2d 142, 148 n. 8 (2d Cir.), *cert. denied*, 493 U.S. 811, 107 L. Ed. 2d 25, 110 S. Ct. 57 (1989)(refusing to apply federal ERISA where state

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[16] CERCLA applies to pre-1980 release of toxic substances and such retroactive application has been recently upheld. *United States v. Olin Corporation*, 107 F.3d 1506, 1513-14 (11th Cir. 1997). Defendants do not raise this issue as a defense.

law was not inconsistent with federal law). By its terms, the FRCD specifically preempts state law only insofar as "the applicable limitations period for such action (as specified in the State statute of limitations or under Common law) provides a commencement date which is earlier than the federally required commencement date." 42 U.S.C. § 9658(a).

Generally, there is no need for the FRCD's preemptive effect to save claims time-barred under § 214-c(2) as the New York Legislature has provided that in the normal course of toxic tort litigation, if the otherwise applicable period of limitations has run under § 214-c(2), a plaintiff's sole recourse would be to invoke the "discovery of the cause of the injury" accrual rule, § 214-c(4), by demonstrating that it was not possible to determine the cause of his injury within the limitations period for § 214-c(2), the "discovery of the injury rule." § 214-c(4); *Wetherill v. Eli Lilly & Company*, 89 N.Y.2d 506, 678 N.E.2d 474, 477, 655 N.Y.S.2d 862 (N.Y. 1997). Defendants assert that the FRCD is inapplicable to personal injury claims in New York because § 214-c(4) and the FRCD provide for identical accrual dates, and thus, in Defendants' view, preemption is unnecessary. Defendants' Memorandum of Law, at 25.

Although under both the FRCD and § 214-c(4), the time in which to commence an action is measured from the date the plaintiff knew or should have known the cause of his injury, the FRCD and § 214-c(4) are nevertheless inconsistent to the extent that § 214-c(4) permits the action only where the cause of the injury is discovered within the five years of the discovery of the injury. *See* N.Y. Civ. Prac. L. & R. § 214-c(4). Thus, because the availability of the one year limitations period under § 214-c(4) is limited to situations where the cause of the injuries is discovered within five years of the discovery of the injury, § 214-c(4) provides for an

earlier accrual date than permitted by the FRCD under which the accrual of the potential claim is temporally unrestricted. *Compare* 42 U.S.C. 9658(b)(4)(A), *supra*, at 12.

Accordingly, to render § 214-c(4) consistent with federal law, the FRCD's preemptive effect applies to § 214-c(4) to nullify only the maximum five year period within which the statute of limitations under § 214-c(4) applies in a case within the FRCD's terms. As the FRCD does not affect the actual limitations periods established by state law, the one year period provided by § 214-c(4) will attach to the claim upon discovery of the cause of the injury, as the FRCD permits, regardless of how much time has elapsed since the discovery of the injury. Therefore, the FRCD's preemptive effect does not displace the one year period established by § 214-c(4).

However, Plaintiffs' assertion that they discovered the causes of their respective decedents' injuries in 1994 or 1995 is significant. Bloom Affidavit, Exhibits 1-20. In opposing Defendants' motions with regard to the earlier motions to compel discovery, it was asserted by Plaintiffs that the FRCD was December 19, 1994, on which the preliminary findings of the environmental consultants' reports and studies commissioned by a local law firm were shared with Plaintiffs at a meeting with a member of the firm. Plaintiffs' Responding Affidavit to Defendants' Motion to Compel Discovery (Doc. # 134), filed June 7, 1996, at p. 8, P 19. Thus, the information was available on December 19, 1994 for all Plaintiffs to learn the cause of their decedents' injuries. *See* Discussion, *supra*, at 26 F. Supp. 2d at 526-528. Accordingly, December 19, 1994 is the latest possible FRCD for any of these claims whose timeliness depends on the FRCD because they are otherwise time-barred under New York law.

Defendants further argue that even if the court finds that the FRCD preempts the specific accrual rules established by § 214-c, as § 214-c applies only to those acts which occurred on or after July 1, 1986, Defendants' Memorandum of Law, at 15-16, no Plaintiff for whom the injury was discovered prior to July 1, 1986, and for which injury more than three years had elapsed between the date of exposure and July 1, 1986, can invoke any part of § 214-c, and thus the FRCD, to demonstrate the required timeliness of such claim. Defendants' Memorandum of Law, at 15-16. Defendants' argument is based on N.Y.Civ. Prac. L. & R. § 214-c(6) which restricts the applicability of the new limitations period under § 214-c. *See Discussion, supra*, at 31-32. However, as noted, the FRCD preserves all claims brought in a state court after December 11, 1980. Accordingly, the instant claims were not time-barred under § 214-c(6)(c),[17] and, as such, receive the benefit of the more favorable statute of limitations under § 214-c, as preempted by the FRCD.[18]

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[17] The FRCD by its terms preempts the capacity of § 214-c(6) to disallow a claim where more than three years have run from the time a plaintiff knew or should have discovered the injury prior to 1986 as § 214-c(6) does not apply where the cause of the injury is discovered after the FRCD's effective date of December 11, 1980.

[18] The fact that the FRCD allows some toxic tort claims to be pursued if filed after December 11, 1980 does not imply that all such claims based on pre-1980 exposures remain viable. Thus, any toxic tort claims which may have been litigated and judicially determined to be time-barred could not be relitigated under the FRCD as such claims would necessarily have been based on the plaintiffs' awareness of both the asserted injury and its cause. These claims would by definition be excluded from the FRCD.

Summary judgment should therefore be GRANTED as to the survival actions filed later than December 19, 1995, *i.e.*, after the one year limitations period available under § 214-c(4) had run from the asserted FRCD of December 19, 1994, specifically, the survival actions of Anthony J. Marino, Joseph J. Wiedenbeck, and Isabelle A. Wiedenbeck. As discussed, depending on the determination of the respective FRCD, the survival action of Nelson M. Hirsch may be timely under New York law even without application of the FRCD. Further, the timeliness of the remaining survival actions cannot be determined until the correct FRCD, the date Plaintiffs discovered or should have discovered the cause of decedents' injuries, is established, an issue not presented to the court on this motion. Summary judgment should therefore, be DENIED as to the survival actions of Evo T. Astor, Charles W. Batt, Rose E. Batt, Lorraine R. Brzezicki, Mary Jane Farino, Robert L. Farino, Stephen C. Grandillo, Gretchen A. Heaney, Nelson M. Hirsch, Joseph A. Inzinna, Henry A. Kuczka, Robert A. Martzolf, Vincent J. Mongiovi, Alfred G. Mucha, George Pagels, Leo N. Phillips and Mary M. Sturm.[19]

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[19] It appears to the court that Defendants presently proceed on the assumption that the latest possible date of discovery of the cause of the decedents' injuries is December 19, 1994 as Plaintiffs alleged in their papers filed with regard to the Defendants' earlier discovery motion. As these actions were commenced within one year of that date, they must, unless an earlier discovery date can be established, be considered timely within the one year period required under § 214-c(4).

e. The FRCD's Effect on Plaintiffs' Wrongful Death Actions under New York Law

Whereas a survival action is an action for personal injuries which survives and is brought on behalf of a decedent with any damages recovered becoming part of the decedent's estate and are distributed according to the decedent's will or the laws of intestacy, a wrongful death action may only be asserted by the distributees of an estate to recover the pecuniary loss suffered by such distributees as a result of decedent's death. *See, e.g.*, N.Y. Est. Powers & Trusts Law § 5-4.1, 5-4.3 and 5-4.4; *Ratka, supra,* 378 N.E.2d at 1030. In the instant case, the court concludes that the plain meaning of the FRCD, the broad remedial purpose and the public policy of CERCLA support holding that the FRCD applies to wrongful death actions as well as survival actions.

Defendants maintain that the FRCD's reference to "any action brought under State law for personal injury," 42 U.S.C. § 9658, requires that the term "personal injury" be defined according to state law under which it is provided that wrongful death actions are not actions for personal injury actions. Defendants' Reply Memorandum of Law, at 2, 3-5. Defendants offer no support for this position, but instead rely on a New York statute, Gen. Const. Law § 37-a (McKinney 1951) which states 'personal injury' includes libel, slander and malicious prosecution; also an assault, battery, false imprisonment, or other actionable injury to the person either of the plaintiff, or of another". Under New York law, this definition of personal injury covers "every variety of injury to a person's body, feelings, or reputation." *Barracca v. St. Francis Hospital*, 166 Misc. 2d 726, 634 N.Y.S.2d 941, 942 (Sup. Ct. Queens County 1995), *citing Bonilla v. Reeves*, 49 Misc. 2d 273, 267 N.Y.S.2d 374 (Sup. Ct. N. Y. County 1966). In *Annunziato v. City of New York*, 224 A.D.2d 31, 647 N.Y.S.2d 850 (App. Div. 2d Dep't.

1996), the court declined to extend application of the discovery rule under N. Y. Civ. Prac. L. & R. § 214-c to wrongful death actions on the basis that § 214-c is "by its express language limited to causes of action to recover damages for personal injury and injury to property." *Annunziato, supra*, 647 N.Y.S.2d at 854; *accord, Matter of Estate of Kritzer*, 146 Misc. 2d 1050, 553 N.Y.S.2d 968, 970 (Surr. Ct. New York County 1990), and *In re Fahys*, 18 F. Supp. 529 (S.D.N.Y. 1937). Therefore, if New York law controlled, the term "personal injury" as used in the FRCD could be held to exclude wrongful death actions.

On the other hand, Plaintiffs assert that their wrongful death actions seek recovery of damages for the injuries personally sustained by each Plaintiff in the form of lost future income and services as a direct consequence of the decedents' personal injuries which led to their deaths. Plaintiffs Memorandum of Law in Opposition to Partial Summary Judgment, at 6. Plaintiffs' arguments are grounded in public policy and congressional intent, factors which may only be considered where the plain meaning of the terms of a statute are ambiguous or unclear. *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2d Cir. 1995)("the plain meaning of a statute is normally controlling except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters")(internal quotations omitted). Plaintiffs therefore maintain that the FRCD should preempt the accrual date of the statute of limitations for wrongful death actions because (1) the pecuniary losses incurred by plaintiffs are personal to each plaintiff therefore constituting a personal injury within the meaning of that term as used by the FRCD, (2) wrongful death actions are derivative of personal injury actions, and (3) the remedial purposes of CERCLA and the FRCD support such an application. Plaintiffs' Memorandum of Law, at 4-9.

1. Wrongful Death Actions are Actions for Personal Injury Within the Plain Meaning of the FRCD

The fact that the FRCD applies to an action brought under state law does not require that the definition of a critical undefined term in that statute be defined by that state's law. Moreover, where a federal statute is concerned, unless the statute directs otherwise, the definitions of terms as they appear within such federal statute are determined in accordance with federal law. *See* Discussion, *supra*, at 26 F. Supp. 2d at 525. The FRCD itself does not contain any suggestion that the general rule that federal law controls the interpretation of a term used in a federal statute does not apply to it.

Here, the plain meaning of the term "personal injury" within the context of the FRCD indicates it encompasses a wrongful death actions as "an action . . for personal injury." 42 U.S.C. § 9658(a)(1). "Injury" is commonly defined as "a violation of another's rights for which the law allows an action to recover damages or specific property or both: an actionable wrong." Webster's Third New International Dictionary of the English Language Unabridged 1164 (1986). "Personal injury" is defined as "an injury affecting one's physical and mental person as contrasted with one causing damage to one's property [or] an injury giving rise to a personal action at law." *Id.* at 1686. This definition of "personal injury" thus distinguishes between injury to one's person as compared to injury to one's property. In Black's Law Dictionary, "personal injury" is defined as "a hurt or damage done to a man's *person*, such as a cut or bruise, a broken limb, or the like, as distinguished from an injury to his property or his reputation, [although] the term [personal injury] is also used (usually in statutes) in a much wider sense, and as including any injury

which is an invasion of personal rights." Black's Law Dictionary, 786 (6th ed. 1990)(Italics in original).

A wrongful death action brought to recover pecuniary damages attributed to the wrongful taking of a life is a remedy for the violation of the decedent's dependents' right to financial support lost to them as a result of their decedent's death. As wrongful death actions arise from injury to one's person rather than to one's property, they are within the plain meaning of the term "personal injury." Whether an action seeking damages for personal injuries should receive the benefit of the preemptive force of the FRCD is directly related to the purposes of the FRCD, "to provide legal redress for harm to man" through uniform access to state courts for toxic tort victims. *See* Study Group Report, at 28-30. That the FRCD itself applies to recovery for personal injury and property damage demonstrates that "harm to man" was understood by Congress as referring to not only physical or bodily injury to persons, but also to economic loss caused by exposure to hazardous substance or waste. Had Congress provided that the action subject to the FRCD was limited to physical or bodily injuries, such would more persuasively support the Defendants' theory that the FRCD excludes wrongful death actions which are typically directed at recovery of economic loss rather than for physical harm to the victim-decedent. To permit such restricted scope to be determined by exclusive reference to state law, as Defendants urge, would risk destroying the national uniformity Congress sought to achieve by enacting the FRCD.[20]

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[20] The term "personal injury" has also been held to include wrongful death actions in connection with other federal legislation. For example, the term "personal injury" as used in federal tax law has been construed as encompassing wrongful death actions. Specifically, "gross income" under Internal Revenue Code § 104(a)(2) does not include "the

(Footnote continued on next page)

In further support of their position that "personal injuries" should not be construed as including "wrongful death actions," Defendants point to one sentence in the Study Group Report which states "in states that have not clearly adopted the discovery rule (*i.e.*, that the cause of action accrues from the time the plaintiff discovered or reasonably should have discovered the injury or disease) the cause of action will usually be time-barred when the plaintiff discovers *his hurt.*" Study Group Report, at 240-41 (emphasis added); Defendants' Memorandum of Law, at 22. Defendants' argument that the quoted reference to "his hurt" signals that the Study Group itself did not consider altering state toxic tort rules except as to the injured victim only, must be rejected for several reasons. First, as noted, Congress adopted none of the ten alternative recommendations proposed by the Study Group which was established to assist Congress in achieving the objectives of CERCLA § 301. Instead, Congress enacted the FRCD, a concept not ever discussed by the Study Group Report, to rectify the problem of the harm inflicted on humans by releases of hazardous substances which the Study Group had been directed to address. The fact that the FRCD was not among the Study

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amount of any damages received . . . on account of personal injuries." I.R.C. § 104(a)(2) (1997). According to the Internal Revenue Service, damages recovered in wrongful death actions are excluded from gross income pursuant to I.R.C. § 104(a)(2). Rev. Rul. 54-19, 1954-1 C.B. 179. The Supreme Court, pursuant to Rev. Rul. 54-19, has held wrongful death awards are damages received on account of personal injuries. *Norfolk and Western R. Co. v. Liepelt*, 444 U.S. 490, 496, 62 L. Ed. 2d 689, 100 S. Ct. 755 (1980). The discovery rule has also been applied to survival and wrongful death actions under the Federal Tort Claims Act. *See Barrett, supra.*

Group's recommendations indicates that Congress found the Study Group Report's recommendations inadequate for meeting the stated purpose of § 301. The Study Group Report therefore is of limited assistance in gauging the meaning of key terms as used in the FRCD.

Second, although it can be argued that the phrase "his hurt" was intended to refer only to the bodily or physical injury suffered by the victim exposed to the toxic substance, that argument is undercut by the references elsewhere in the text of the Study Group Report to the discovery of "the injury or disease." *See, e.g.*, Study Group Report, at 240 ("Since many of the hazardous wastes are carcinogens, mutagens, teratogens, or substances with delayed impact on different organs or the central nervous system, the latency period for the appearance of injury or disease is likely to be extended for thirty years or more). Drawing a distinction between "injury" and "disease" without any reference to "property damage" indicates that the terms "injury" and "hurt" as used by the Study Group Report are to be broadly construed as including more than simply a physical or bodily harm to the victim exposed to the toxic substance. The FRCD's reference to "the plaintiff" without a possessive modifier further supports this finding.

Third, the Study Group Report did not need to specifically refer to survival and wrongful death actions in discussing potential remedies for personal injuries or hurt. Except where, depending upon the particular statutory scheme, special statutes of limitation rules apply, the term personal injury both as used by lawyers and non-lawyers is commonly understood and even advertised as encompassing survival and wrongful death actions.[21] This is so because it is horn-

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[21] A perusal of the Yellow Pages of one of the two major Buffalo area telephone directories reveals at least a dozen

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book law that survival and wrongful death actions derive from a decedent's injuries suffered while still alive. *See* Discussion, *supra*, at 26 F. Supp. 2d at 524.

Fourth, there are indications in the Study Group Report that the Study Group was aware that the problem of providing for remedies for losses to individual persons caused by toxic exposures resulting in death needed to be addressed by Congress. For example, in its discussion of existing federal statutes providing personal injury remedies, the Study Group Report cites nine such statutes, including the Black Lung Act of 1981, the Federal Employers Liability Act, the Jones Act and the Federal Tort Claims Act, each of which provides for remedies in cases of death. It may be fairly inferred from this discussion of such available remedies that the Study Group was well aware that toxic exposures frequently result in the

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advertisements in which the lawyer or law firm is promoted as handling personal injury claims. In each such advertisement, wrongful death is listed as a sub-category of a personal injury action. Typical is the full page advertisement for the law firm of a retired New York Court of Appeals judge which refers to such firm as "Personal Injury Attorneys." The advertisement further states in contrasting print that the firm's "Practice is Limited Exclusively to Personal Injury & Accident Claims." Included among the fourteen types of cases handled by the firm is "Wrongful Death." The Talking Phone Book, 1997-98 ed., covering Erie County, at 603. Another high profile personal injury firm's advertisement is similar. *See id.*, at 563. At least twenty such advertisements indicate the law firm handles personal injury actions, with no mention of wrongful death actions. *See, id.* Further, in only three advertisements are wrongful death actions listed as a category separate from personal injury actions. *See, id.*, at 587, 588 and 590.

death of the exposed person and that any remedial measure adopted by Congress to deal with the issue of providing legal redress for injuries to man resulting from such exposures would necessarily include survival and wrongful death actions.

2. The FRCD's Legislative History FRCD Indicates Congress Intended Actions for Personal Injury to Include Wrongful Death Actions Within the Context of the FRCD

Finally, finding that "personal injury," as that term appears in the FRCD, includes wrongful death actions comports and does not produce a result that is demonstrably at odds with congressional expressions of intent leading to enactment of CERCLA and the FRCD. The leading Senate bill drafted in the process of enacting CERCLA provided for recovery limited to medical costs incurred by persons injured through exposure to toxic substances to be paid out of CERCLA's environmental clean-up fund. S. 1480, 96th Cong., 2d Sess. § 6(a)(1)(M)(3)(A)(1980). This provision was not included in the final version of the House bill which became CERCLA, H.R. 7020, 96th Cong., 2d Sess. (1980). However, just prior to the Senate's passage of H.R. 7020, Senator George Mitchell addressed the Senate expressing his strong concern that the bill was "deficient because while it provides for the cleanup of places, and compensation for damage to things, it provides nothing for what is the most important part of the problem: injury to the people." 126 Cong. Rec. S 14973 (daily ed. Nov. 24 1980)(statement of Sen. Mitchell). Senator Mitchell further argued that "our failure to provide compensation from the fund for persons who are injured is even less defensible when we recall that S. 1480 provides liability only for out-of-pocket medical expenses. There would have been no compensation for the pain and suffering of an individual, or for the psychological damage he or she might sustain, or for the ultimate loss, death." *Id.* at S14,974

(emphasis added). It is well known that the CERCLA legislation as enacted was the product of much compromise as is demonstrated by comments contained in a letter from Senators Robert T. Stafford and Jennings Randolph to Representative James J. Florio, which accompanied H.R. 7020 as amended and passed by the Senate on November 24, 1980.[22] The § 301(e) study group provision contained in the version of H.R. 7020 passed by the Senate on November 24, 1980, S 1480, 96th Cong., 2d Sess. § 301(e)(1980), was the result of such compromise. Study Group Report at 6-9. This legislative history therefore provides at least some clear indication that among congress' motives in its determination to enact a comprehensive response to the damages caused by pollution was redressing the loss of human life.

The legislative history of SARA also supports this conclusion. As discussed, the § 301(e) Study Group Report influenced the SARA legislation, adopted six years later, which addressed CERCLA's unfinished business of providing "legal redress for harm to man." During congressional debate over SARA, then Senator Albert Gore

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[22] Specifically, the letter states "on Monday, November 24, the Senate passed a compromise "superfund" bill and sent it to the House by a vote of 78 to 9. That the bill passed at ail is a minor wonder. Only the frailest moment-to-moment coalition enabled it to be brought to the Senate floor and considered. Indeed, within a matter of hours that fragile coalition began to disintegrate to the point that, in our judgment, it would now be impossible to pass the bill again, even unchanged." Letter from Senators Robert T. Stafford and Jennings Randolph to Representative James J. Florio (Dec. 2, 1980), *reprinted in* 1 Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, at 774-75 (1980).

proposed an amendment which would have permitted reimbursement from the Superfund for costs associated with personal injuries stating that "damages of this nature are such things as death or the total destruction of one's property or chattel. Most personal injury suits present damages like these." Cong. Comm. on Environment and Public Works, 97th Cong., 2d Sess., 352 (1983)(Statement of Sen. Gore)(emphasis added). To further assure this issue was addressed in the SARA legislation, Representative Barney Frank offered an amendment to create a federal cause of action for personal injuries, including death. 131 Cong. Rec. H11,547-01 (daily ed. December 10, 1985)(statement of Rep. Frank). Because the SARA bill already included the FRCD, Representative John Breaux, in opposing the Representative Frank's amendment, stated that "the amendment is not needed in light of evolving State law and the procedural reforms in [the FRCD]." 131 Cong. Rec. H11,547-01(daily ed. Dec. 10, 1985)(statement of Rep. Breaux). Although his amendment was not accepted, Congressman Frank nevertheless voted in favor of the final SARA bill which included the FRCD. 131 Cong. Rec. H11,547-01 (daily ed. December 10, 1985)(rollcall vote). While admittedly not decisive, these comments indicate that at least these legislative leaders intended that SARA would deal with a major national problem left unresolved by CERCLA, the redress of claims for damages suffered by people as a result of exposure to hazardous substances, including damages where death results. Such legislative history is consistent with a finding that in enacting the FRCD Congress intended actions for personal injury brought under state law as including wrongful death actions.

Defendants contend that because the amendment offered by Representative Frank referred to actions for personal injury, illness and death, the failure to adopt this amendment demonstrates Congress must have conceived that the term

"personal injury" as used in the FRCD, excludes, by contrast to the terminology of the proposed amendment, an action for death. Defendants' Memorandum of Law at 24. Defendants' theory ignores the fact that Representative Frank's proposed amendment would have created a special federal cause of action in federal court for toxic torts in the context of existing federal statutory causes of action which do specifically provide for personal injuries as well as death, including the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.*, and the Jones Act, 46 U.S.C. App. § 678. However, the FRCD does not create a cause of action, rather, it provides for a uniform rule of accrual for toxic tort claims brought under state law. The right to bring such actions had already been granted under the laws of most of the states at the time the FRCD was enacted, Study Group Report, App. L, and that right extended to wrongful death claims based on toxic exposure with long term latency and effects upon the body, if otherwise timely. *See, e.g., Rothstein, supra.* Defendants' argument therefore fails to explain why Congress would seek to apply the FRCD's more flexible discovery rule to personal injury actions based on then existing state law caused by exposure to toxic substances, but not to death actions. As discussed, *supra*, at 26 F. Supp. 2d at 535-536, there is no reasonable basis to suppose Congress so intended. Accordingly, Defendants' argument unnecessarily emphasizes the differences between applicable periods of limitation for wrongful death and other tort actions under New York and other state law. If accepted, such technical distinctions would frustrate Congress' purpose in enacting the FRCD.

Defendants also rely on several state cases generally holding that, based upon the particular relevant accrual rules for state wrongful death actions, the discovery accrual rule should not be applied to wrongful death actions because to do so would judicially displace a clearly enunciated contrary rule

established by the respective state's legislature. Defendants' Memorandum of Law, at 38-39 (discussing *Pobieglo v. Monsanto Company*, 402 Mass. 112, 521 N.E.2d 728 (Mass. 1988); *Pastierik v. Duquesne Light Company*, 514 Pa. 517, 526 A.2d 323 (Pa. 1987); *Trimper v. Porter-Hayden*, 305 Md. 31, 501 A.2d 446 (Md. 1985)). A careful reading of these cases, however, reveals that the preemptive effect of a federal accrual rule on state statutory limitations periods was not at issue and the emphasis placed by those courts on the death of a victim as the proper accrual date for survival and death actions is unpersuasive where the issue is not what an individual state legislature may have intended, but how to give effect to an act of Congress.

For example, the court's reliance in *Pastierik*, upon the ability of a decedent's survivor to initiate scientific examinations necessary to definitively determine the cause of death, including autopsies which could not be performed on a living injured person. *Pastierik*, at 325, had already been rejected by other state and federal courts. In *White v. Johns-Manville Corp.*, 103 Wash. 2d 344, 693 P.2d 687 (Wash. 1985), the court held a wrongful death action commenced six years after the decedent's death was timely as commenced within the relevant three year limitations period where the estate representative, decedent's widow, did not learn until four and one half years after her husband's death from a form of lung cancer that workplace asbestos exposure of over 30 years may have caused his death. Specifically rejecting assertions that autopsy reports and death certificates will inevitably reveal the cause of an occupationally related death based on exposure to toxic substances with long periods of latency, *White*, 693 P.2d at 693-97, the court noted that the research necessary to establish the causal link between various forms of cancer and hazardous occupational exposure requires "numerous years and vast resources." *Id.* at 694. The court found any unfairness associated with "unearthing" wrongful

death actions based on later discovered facts by a decedent's representative establishing cause was outweighed by the hardship imposed on the survivors "unblamably left without a remedy," and extended the discovery accrual rule to the plaintiff's survival action allowing her to "step into the shoes" of the decedent to determine when the action accrued. *Id.* at 694-95. In *White*, the court pointed out that defendants' argument, similar to Defendants' argument here, that the survival action accrues upon the decedent's death confuses the existence of the cause of action with the accrual of the action for purposes of triggering the applicable period of limitations. *White* at 695. As the court stated, ". . . what survives to the personal representatives are not only the decedent's ripe causes of action but . . . their potential causes of action which may not have accrued at the time of death." *Id. Accord Barrett v. United States*, 689 F.2d 324 (2d Cir. 1982); *Hanebuth v. Bell Helicopter*, 694 P.2d 143 (Alaska 1984); *Myers v. McDonald*, 635 P.2d 84 (Utah 1981); *Coleman v. Hinsdale Emergency Medical Corp.*, 108 Ill. App. 3d 525, 439 N.E.2d 20, 64 Ill. Dec. 91 (Ill. App. 2d Dist. 1982); *Maughan v. SW Servicing, Inc.*, 758 F.2d 1381 (10th Cir. 1985); *see also*, Zelin, *Time of Discovery as Affecting Running of Statute of Limitations in Wrongful Death Action, supra.*, §§ 4, 5 and 8.

In none of these latter cases do the courts identify any of the issues raised by Defendants here as obstacles to the application of the discovery rule to survival or wrongful death actions based on the knowledge to be attributed to an injured decedent's representative. Equally significant is that it was against this background that Congress enacted the FRCD to establish a clear and uniform rule of accrual for toxic tort litigation in the state courts. Indeed, these cases, which precede the FRCD's enactment, exemplify the "evolving state law" which, as Representative Breaux argued against Respresentative Frank's proposed

amendment in December 1985, negated the need for a federal cause of action for toxic torts including a death action. *See* Discussion, *supra*, at 26 F. Supp. 2d at 536.

As discussed, failing to apply the FRCD to wrongful death actions produces an anomolous result when it is recalled that the FRCD also applies to property damage claims.[23] In New York, "no cause of action for injury to person *or property* is lost because of the death of the person in whose favor the cause of action existed." N.Y. Est. Powers and Trusts Law § 11-3.2(b)(McKinney 1997)(emphasis added). Barring the FRCD's applicability to wrongful death actions, as Defendants argue, results in the situation Senator Mitchell warned of when the Senate rejected S. 1480, which included a provision for reimbursement of medical expenses of victims exposed to hazardous substances, in favor of H.R. 7020 which ultimately became CERCLA. 126 Cong. Rec. S 14973 (daily ed. Nov. 24 1980)(statement of Senator Mitchell). As Senator Mitchell stated, "under this bill, if a toxic waste discharge injures both a tree and a person, the tree's owner, if it is a government, can promptly recover from the fund for the cost of repairing the damage, but the person cannot. In effect, at least as to the superfund, it's all right to kill people, but not trees." *Id.* As discussed, the purpose of SARA in general and the FRCD in particular was to assure that redress of injuries to people as well as to the environment because of exposures to hazardous substances would be equally available.

The court's finding that the FRCD extends to survival and wrongful death actions, and the concomitant absence of any persuasive reasons opposing such an extension, is consistent with the legislative judgment implied in the FRCD. The

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23 *See* Discussion, supra, at 26 F. Supp. 2d at 529.

determination of inherently arbitrary statutory limits requires that legislatures "balance" the nature of the claimed injuries with the "surprise" factor, in this case, the extent to which the industry participants generate, transport and store the toxic substances, could justifiably claim ignorance of the dangerous character of the substances and surprise at being subjected to private claims beyond traditional statute of limitations rules. Study Group Report, at L-11. Accordingly, in enacting the FRCD Congress balanced the polluter's expectation of repose with the injured party's desire to be made whole. The consideration of any unfairness to a defendant in being required to defend such claims, regardless of whether the victim is alive or dead, extends equally to a plaintiff, whether a living victim or the representative of his estate or his beneficiary. There is, therefore, no reason to suppose Congress in enacting the FRCD intended to limit its benefits to cases involving only persons who survive their toxic exposures long enough to invoke it.[24]

As stated, the applicable limitations period for wrongful death actions under New York law is two years measured from the date of death. N.Y. Est. Powers & Trusts Law § 5-4.1 (McKinney 1981). Preempting that statute of limitations to the extent that it is inconsistent with the FRCD, *i.e.*, that § 5-4.1 provides for an accrual date earlier than the date plaintiff knew, or should have known the cause of the injury,

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[24] The court notes that in *Wagar v. BASF Corporation*, 1990 U.S. Dist. LEXIS 11187, *14, 1990 WL 124069, *5 (N.D.N.Y. 1990) relied on by Defendants, Defendants' Memorandum of Law, at 21 n. 14, the court held that plaintiffs' breach of warranty claim was not within the scope of personal injury or property damages as defined under the FRCD. As no breach of warranty claim is asserted here, the court need not address that issue.

yields two years within which to timely file a wrongful death action measured from the asserted FRCD, here, December 19, 1994. Accordingly, all the instant wrongful death claims, filed between January 10, 1995 and June 17, 1996, are timely if, as asserted by Plaintiffs, the correct FRCD is December 19, 1994. As the true FRCD, an issue of material fact, has not yet been established on this motion to be an earlier date, *i.e.*, more than one year prior to the filing of the instant actions, summary judgment dismissing the wrongful death actions should be DENIED.

2. Constitutionality of 42 U.S.C. § 9658

Defendants have challenged the constitutionality of the FRCD arguing it represents an exercise of congressional power beyond the limits of the Commerce Clause and also violates the Tenth Amendment. Defendants' Memorandum of Law, at 27. Plaintiffs assert that the FRCD was validly enacted pursuant to Congress' authority under the Commerce Clause and does not invade the sovereignty of the states. Plaintiffs' Memorandum of Law at 16, 20-21.

a. Commerce Clause Power

The Commerce Clause of the United States Constitution grants Congress the power "to regulate commerce . . . among the several states . . .." U.S. Const., Art. 1, § 8, cl. 3. Whether a congressional act is valid under the Commerce Clause was recently determined in *United States v. Lopez*, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), where the Supreme Court held that Congress exceeded its authority under the Commerce Clause by enacting the Gun-Free School Zone Act of 1990, 18 U.S.C. § 922(q) ("the Act"), which made possession of a firearm within a school zone a federal crime. There, the Court stated that the Commerce Clause permitted Congress to regulate and protect three

broad categories of activity including (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of the interstate commerce, or persons or things in interstate commerce," and (3) "those activities that substantially affect interstate commerce." *Lopez, supra*, 115 S. Ct. at 1629-30. As there was no indication that possession of a gun within a school zone involved the channels or instrumentalities of interstate commerce or could be shown to have had any effect on interstate commerce, the Act could not be sustained under any of the three categories of permissible interstate regulation and was beyond the scope of congressional power under the Commerce Clause. *Lopez, supra*, 514 U.S. at 558-59. In the instant case, Defendants similarly contend that the FRCD is not within any of these three forms of activities established by the Supreme Court as permissible for congressional regulation and protection under the Commerce Clause. Defendants' Memorandum of Law, at 28-29.

Channels of interstate commerce are defined as the routes of transportation. *See, Lopez, supra,* at 558 (citing *Heart of Atlanta, Inc. v. United States*, 379 U.S. 241, 256, 13 L. Ed. 2d 258, 85 S. Ct. 348(1964)(holding regulation of the interstate transportation of goods and passengers were well within the regulatory power of Congress under the Commerce Clause)). Instrumentalities of interstate commerce are defined as the means of interstate transportation. *Lopez, supra*, 514 U.S. at 558 (citing cases). As the FRCD does not directly or indirectly seek to regulate either the channels or instrumentalities of interstate commerce, its validity is not found within the first two categories of permitted Commerce Clause regulation.

Defendants also argue that the FRCD is not within the third category as *Lopez* requires an independent evaluation of the FRCD's constitutionality under the Commerce Clause based

on legislative findings regarding the FRCD's effect on interstate commerce and here, as in *Lopez*, no such legislative findings exist to establish the constitutionality Defendants' Reply Memorandum of Law at 11. Defendants further maintain that the FRCD is not an essential part of CERCLA as CERCLA's regulatory scheme for the clean up of hazardous waste sites would not be disrupted if the FRCD is not given effect and, as such, the FRCD's constitutionality cannot be measured based on the constitutionality of CERCLA itself. Defendants' Reply Memorandum of Law at 10-11 (citing *Lopez, supra*, 115 S. Ct. at 1631, 1632).

Congress is not, however, required to establish by specific legislative findings that every detail of a complex federal regulatory program is constitutional if the challenged provision is "an integral part of the regulatory program and the regulatory scheme when considered as a whole" can be shown as "independently and directly related to a valid congressional goal." *Hodel v. Indiana*, 452 U.S. 314, 328 n. 17, 69 L. Ed. 2d 40, 101 S. Ct. 2376 (1981)(regulation of prime farm land upheld under Surface Mining Act, 30 U.S.C. § 1201 *et seq.*, despite claim that amount of affected land constituted small portion of total national farm land acreage). In *Hodel*, the Supreme Court sustained the challenged regulation under the Commerce Clause because of the valid federal interest in protecting prime farm land as an essential link in the nation's food supply chain. *Hodel, supra*, at 335. Additionally, given the broad objectives of CERCLA to remedy the defects of hazardous substances which have been discharged into the environment, "to provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites," Comprehensive Environment Response, Compensation and Liability Act, 94 Stat. 2767, *reprinted in* 1 Legislative History of the Comprehensive, Environmental Response,

Compensation and Liability Act of 1980, at 3 (1980), the court finds the FRCD is an essential part of CERCLA as Congress, by enlarging access to state court remedies through a partial preemption of state statutes of repose for actions based on exposure to toxic substances as defined in CERCLA, rationally sought to regulate activities which substantially affect interstate commerce.

It is undisputed that Defendants in the instant case who are alleged to have generated the hazardous substances located at the Landfill were involved in the manufacture and distribution of products for sale from which hazardous substances subject to CERCLA were by-products. The intimate connection between the generation, transportation, storage, and disposal, lawful or not, of hazardous wastes and interstate commerce is well-established. *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 340 n.3, 119 L. Ed. 2d 121, 112 S. Ct. 2009 (1997). Private tort actions for personal injuries and property damage, including punitive damages, were viewed by the § 301(e) Study Group as effective mechanisms to remedy and deter future danger to public health from improper disposal of hazardous substances. Study Group Report, at 21-22. Thus, the possibility of suit for personal injury and property damage based on the disposal of such hazardous substances directly impacts a business organization's decision whether to participate in an industry which may subject the organization to liability for such claims. The threat of such private actions also creates an added incentive to strictly comply with requirements directed to reducing the risk of future damage to the environment and individuals resulting from exposure to regulated hazardous substances. As CERCLA broadly serves to remedy damage to the environment including navigable waters, surface and ground water, drinking water supply, land surface or subsurface strata and ambient air within the United States, *see* 42 U.S.C. § 9601(8),

strengthening the capability of private persons to invoke state remedies for such resulting damage to persons and property caused by tortious conduct involving hazardous substances directly and substantially affects interstate commerce.

Additionally, in contrast to *Lopez* where the Supreme Court determined that the Gun-Free Zone statute at issue was not part of a larger regulatory scheme which had a substantial impact on interstate commerce, *Lopez, supra*, 514 U.S. at 562-63, here the FRCD *is* an integral part of CERCLA's regulatory scheme which has been held valid under the Commerce Clause as affecting interstate commerce. *United States v. Olin Corporation*, 107 F.3d 1506 (11th Cir. 1997)(analyzing CERCLA in accordance with *Lopez* and holding that CERCLA as applied did not violate the Commerce Clause)[25]; *See also Bolin v. Cessna Aircraft Co.*,

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[25] Plaintiffs, relying on *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 105 L. Ed. 2d 1, 109 S. Ct. 2273 (1989), assert that the constitutionality of CERCLA as a whole has been upheld by the Supreme Court. Plaintiffs' Memorandum of Law at 17-18. However, a careful reading of the decision in *Union Gas, supra*, reveals that there the Court only considered whether Congress in enacting CERCLA intended to abrogate a state's sovereign immunity under the Eleventh Amendment to permit CERCLA actions to be maintained against the states. *Union Gas, supra*, at 10. The Court never considered the constitutionality of CERCLA and, indeed, upon examining the petition for certiorari in that case, it is apparent that the issue was never presented to the Court. *See Pennsylvania v. Union Gas Company*, 832 F.2d 1343 (3d Cir. 1987), *cert. granted*, 485 U.S. 958, 108 S. Ct. 1219, 99 L. Ed. 2d 420 (U.S. 1988). Specifically, the questions presented to the Supreme Court were (1) whether Congress intended to override the states' Eleventh Amendment immunity from suit by amending a definitional section of CERCLA, (2) if so,

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759 F. Supp. 692 (D.Kan. 1991)(upholding the constitutionality of the FRCD under both the Commerce Clause and the Tenth Amendment). As discussed, provision of "legal redress for harm to man" was one of CERCLA's express purposes upon its enactment in 1980. 42 U.S.C. § 9651(e)(1)(emphasis added). *See also Kowalski v. Goodyear Tire and Rubber Co.*, 841 F. Supp. 104, 108 (W.D.N.Y. 1994)(observing that the expeditious cleanup of toxic spills and recovery of cleanup costs are not the only goals of CERCLA).

In enacting SARA which, rather than creating a separate federal cause of action based on injuries attributable to toxic torts or encouraging the states to adopt a federal model for such actions, Congress included the FRCD provision creating a uniform accrual date for state toxic tort actions. As the FRCD preserves the legal remedies for state law claims in support of one of CERCLA's express purposes, which would otherwise be time-barred under the applicable state statutes of limitations, the FRCD is an integral part of the regulatory scheme of CERCLA.[26]

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whether retroactive elimination of such immunity was permitted, and (3) "whether Congress' power to override Eleventh Amendment immunity under the Commerce Clause is limited by the States' right to provide vital services without subjecting themselves to federal court jurisdiction, particularly where the events forming the basis for suit occurred long before the federal scheme was enacted." *Id.* Accordingly, this court does not find *Union Gas* is precedent for the question of CERCLA's or the FRCD's constitutionality.

[26] *Lopez* is further distinguishable from the issue presented here as in *Lopez* the Court struck down a criminal statute finding that to permit Congress to regulate, under the
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Additionally, the constitutionality of CERCLA under the Commerce Clause was recently sustained against an attack based on *Lopez* in *United States v.* Olin *Corporation*, 107 F.3d 1506 (11th Cir. 1997). In *Olin*, the government sued Olin for cleanup and response costs pursuant to CERCLA, 42 U.S.C. §§ 9606(a) and 9607(a)(1)(A). Olin had manufactured mercury and chlorine-based commercial chemicals as its plant site which resulted in contamination of the land at the site. The record established that the contamination was limited to the site and had not contaminated the groundwater flows, although the resulting pollution rendered the site unfit for future residential use. In reversing the district court's decision that, as applied to those facts, CERCLA's cleanup and cost recovery provisions were unconstitutional under the Commerce Clause, the court of appeals acknowledged that Congress in enacting CERCLA did not make specific findings that the generation, transportation, and storage of hazardous wastes affected interstate commerce, nor did it specifically require an interstate jurisdictional element. *Olin, supra*, at 1510.

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Commerce Clause, subjects traditionally within the exclusive domain of the state such as matters of substantive criminal law and education law would render almost any activity subject to federal regulation, *Lopez*, at 564, contrary to the Founders' intent and the terms of the Commerce Clause itself. In contrast to the subject matter at issue in *Lopez*, and as the court's discussion, *infra*, at 26 F. Supp. 2d at 542-543, demonstrates, the regulation of private litigation involving toxic torts is a matter substantially affecting interstate commerce and therefore cannot be said to be a subject within the exclusive domain of the states.

Where no such findings were made or jurisdictional element required by the legislation at issue, *Lopez* mandates the courts make an independent determination that the statute at issue regulates "activities that arise out of or are connected with a commercial transaction which, view in the aggregate, substantially affect [ ] interstate commerce." *Olin, supra*, 107 F.3d at 1509 (citing *Lopez*, 115 S. Ct. at 1631). Further, as to matters which on their facts are asserted to be exclusively of an intrastate nature, to sustain the challenged statute the court must also find that the statute constitutes "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* In making this determination the court's focus cannot be excessively narrow, as it the statute "regulates a *class of activities* . . . and that *class* is within the reach of the federal power, the court have no power 'to excise, as trivial, individual instances' of the class." *Olin, supra*, 107 F.3d at 1508 (quoting *Perez v. United States*, 402 U.S. 146, 154, 28 L. Ed. 2d 686, 91 S. Ct. 1357 (1971) (internal quotations omitted)(italics added).

The court in *Olin* found that the narrowest possible class in the case before it was the regulation of the on-site disposal of hazardous waste produced on-site and, based on the legislative history of CERCLA showing a "nexus between all forms of improper waste disposal and interstate commerce," *Olin, supra*, 107 F.3d at 1511, and concluded that CERCLA's cleanup and cost recovery provisions were constitutionally applied to the Olin property at issue. *Olin, supra*, at 1511. For example, the court noted that the Senate Committee on Environment and Public works found a correlation between the growth of the chemical industry and the costs associated with the handling of its wastes. *Olin*, at 1511, Additionally, the same committee had also found that the chemical contamination from releases had resulted in substantial losses of farmland and commercial fishing, including half the

annual potential fishing in the Great Lakes. *Id.* The committee further noted in its report that beyond the observed commercial damage from interstate traffic in hazardous wastes, similar damage was caused by accidents associated with the unregulated intrastate disposal of such wastes in tanks, lagoons and chemical waste plants. *Id.* Assessing these findings, the court went on to observe that if purely intrastate disposals of hazardous wastes were held beyond the reach of federal regulation, it would cause a severe imbalance in the hazardous waste disposal industry resulting in serious interstate economic effects on an aggregate basis. *Id.* at n. 11 (citing *Wickard v. Filburn*, 317 U.S. 111, 128-29, 87 L. Ed. 122, 63 S. Ct. 82 (1942)(production limited to individual needs if aggregated substantially affects interstate commerce)). The court further noted that hazardous waste has long been recognized as an article of commerce. *Id.* (citing *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 340 n. 3, 119 L. Ed. 2d 121, 112 S. Ct. 2009 (1992)). The court therefore concluded that the regulation of on-site hazardous waste disposal substantially affected interstate commerce and was constitutionally applied to Olin.

In this case, the FRCD is directed to the litigation of claims for personal injury and property damage in the state courts where such claims arise from exposure to hazardous waste located in facilities defined by CERCLA. As held in *Olin*, Congress may impose liability for cleanup costs based on wholly intrastate disposals of hazardous wastes and, therefore, it may also regulate the harm to the environment resulting from such disposals created by both interstate and intrastate activities. If Congress can regulate harm to the environment it must also have the power to regulate such disposals when they result in harm to humans. It would be incongruous that the Commerce Clause allows Congress to protect crops and fish against damages resulting from toxic

substances but not people. Private lawsuits to make whole people who have suffered such damages at the hands of wrongdoers is a form of regulation and compensation long recognized by the law. *Middle East Banking Co. v. State Street Bank International*, 821 F.2d 897, 902 (2d Cir. 1987). Just as Congress may establish statutes of limitations for such actions if they were allowed in federal court, *International Union, supra*, 383 U.S. 696, 703, 86 S. Ct. 1107, 16 L. E. 2d 192; *Oneida Indian Nation of New York, supra*, 470 U.S. 226, 241, 105 S. Ct. 1245, 84 L. Ed. 2d 169, or require the court to apply an analogous statute of limitations based on state law, *Reed v. United Transportation Unit*, 488 U.S. 319, 323, 102 L. Ed. 2d 665, 109 S. Ct. 621 (1989), Congress may, if its power reaches the subject matter, as it does here, also establish the method of accrual by which the timeliness of the claims is to be determined. That is what Congress did in enacting the FRCD and, based on the reasoning in *Olin*, as to contamination of property, the FRCD represents an incident of federal regulation of the deleterious effects of the same hazardous substances and wastes on people and property.

To exclude congressional regulation of accrual rules even if limited to toxic torts arising from wholly intrastate releases of hazardous wastes would frustrate Congress' purpose to provide greater access to the courts for injured parties as part of its comprehensive response to the national problem of controlling and remediating the effects of release of dangerous contaminants. Lack of uniformity in achieving redress in state courts for toxic torts would also lead to potential competitive imbalances in the hazardous wastes disposal industry based on differing schemes for invoking relevant statutes of repose. Therefore, the FRCD is an essential part of a national regulatory system established by CERCLA and represents a valid exercise of congressional power. *Olin, supra; Bolin, supra*, 759 F. Supp. at 707

(finding according to pre-*Lopez* analysis that "Congress retains ample authority under the Commerce Clause to enact legislation regulation activities that result in the release of hazardous substances.")

Defendants nevertheless argue that Plaintiffs should not be permitted to "bootstrap" a determination of the constitutionality of the FRCD based upon the prior judicial determination of CERCLA's constitutionality particularly where the statute at issue represents a "sharp break" with prior law. Defendants' Memorandum of Law, at 30 (citing *Lopez, supra*, 514 U.S. at 563). Defendants' argument lacks merit for several reasons. First, as noted, CERCLA's constitutionality under the Commerce Clause has not been previously addressed by the Supreme Court. Second, the FRCD does not represent a "sharp break" with prior law as Congress has intervened on the subject of tolling state statutes of limitations in the past. For example, the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. § 525, tolls the states' statutes of limitations for any civil action or proceeding, in any court, by or against any person in military service.[27] Further, Congress has often adopted state statutes of limitations to limit purely federally based private causes of actions. *Bolin, supra*, 759 F. Supp. at 709 n. 17. Federal civil rights actions under 42 U.S.C. § 1983, are governed by state statutes of limitations, but the accrual of such action is measured with reference to federal rather than state law. *Cornwell v. Robinson*, 23 F.3d 694, 703 (2d Cir. 1994). Accordingly, the FRCD, which modifies the operation of

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[27] *See Falk v. Levy*, 180 F.2d 562, 564 (2d Cir. 1950)(although debtor made substantial payments on note prior to enlistment in the armed forces, the six-year statute of limitations governing the collection of debts was toiled during debtor's military service).

otherwise applicable state statutes of limitations only to the extent of establishing a uniform accrual date for the relevant cause of action arising from exposure to CERCLA defined hazardous substances, a subject of national concern, does not represent a sharp break with prior law, and, as such, the constitutionality of the FRCD need not be determined independently of CERCLA. This is particularly true where the advent of claims based on exposure to toxic substances now heavily regulated by both federal and state law, is relatively recent. Accordingly, the states' interests in having their accrual rules apply exclusively to this limited category of tort litigation cannot be said to be long-established and beyond the reach of Congress pursuant to its Commerce Clause powers.

As discussed, it was reasonably within Congress' competence to provide for a more limited test for accrual of state law based tort actions for personal injuries resulting from exposure to hazardous substances, in place of more restrictive state accrual requirements. The deterrent effect of such an accrual formula, if it had existed earlier, upon would-be polluters could have helped to prevent the well documented assaults on the nation's natural environment by toxic substance producing industries and others. It is within Congress' prerogative to include existing state law remedies as an integral part of CERCLA's otherwise predominantly federal regulatory scheme. This result is not affected by the fact that such federal reliance on state law involves modifying common law or statutory definitions of when a particular type of tort action, based on existing state law, accrues and no more. For these reasons, enactment of the FRCD represents a proper exercise of Congress' Commerce Clause power.

b. Tenth Amendment

Defendants also argue that the FRCD violates the Tenth Amendment because it impermissibly directs states to regulate state common law tort claims in accordance with federal law by requiring states to provide a remedy for personal injuries, otherwise barred by its laws, caused by hazardous substances according to a federal standard. Defendants' Memorandum of Law, at 34. The court finds that the FRCD does not mandate that the states regulate anything in accordance with a federal standard, but rather preempts state statutes of limitations only to establish a uniform rule for the determination of the accrual date of state law toxic tort claims, which are covered by the FRCD, where the state limitations periods would commence to run earlier than permitted by the FRCD.[28]

The Tenth Amendment provides that "the powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people." Tenth Amendment, U.S. Const. The Framers of the Constitution "explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *New York v. United States*, 505 U.S. 144, 166, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992). Thus, it was envisioned by the Framers that the

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[28] Although not cited by either party in the instant motion, the court notes that the Second Circuit Court of Appeals recently questioned the constitutionality of the FRCD under the Tenth Amendment in *ABB Industrial Systems v. Prime Technology, Inc.*, 120 F.3d 351, 360 n. 5 (2d Cir. 1997), but expressed no opinion on the issue as such was not before the court. Here, the court is presented with that specific issue and, therefore, addresses it.

citizens of the United States "would have two political capacities, one state and one federal, each protected from incursion by the other." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838, 131 L. Ed. 2d 881, 115 S. Ct. 1842 (1995).

A two-step analysis is required to determine whether a congressional act violates the Tenth Amendment. *New York, supra.* First, the challenged action must be within one of Congress' specifically enumerated powers. 505 U.S. at 160. As discussed, enactment of the FRCD is within Congress' power under the Commerce Clause. Second, where the challenged legislation is permissible as within one of Congress' enumerated powers, Congress must regulate by a method which does not impermissibly invade state sovereignty. *Id.,* at 160. If Congress acts within its competence but invades state sovereignty, the enactment violates the Tenth Amendment. *Id.* In this case, the court finds that the FRCD by preempting specific state laws, rather than by mandating that states take legislative or executive action to regulate in accordance with federal law, meets this second criteria.

It is well established that Congress may, under the Supremacy Clause, U.S. Const. art VI, cl. 2, supersede or pre-empt conflicting state law provided Congress has validly exercised an enumerated power. *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 116 S. Ct. 1103, 1105, 134 L. Ed. 2d 237 (1996); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992). The Supremacy Clause provides that the laws of the United States "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary, notwithstanding." U.S. Const. art VI, cl. 2. As the court has found Congress' adoption of the FRCD was within the

Commerce Clause power as defined by the Supreme Court, state law which conflicts with the FRCD may be preempted.

"Congress' intent may be 'explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Cipollone, supra*, at 516 (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 51 L. Ed. 2d 604, 97 S. Ct. 1305 (1977)). Where it is not expressly stated within the text of the statute that Congress intended the statute to preempt state law, preemption will be found in two situations, specifically where Congress (1) evidences an intent to completely occupy a given field, or (2) enacts a law under which "it is impossible to comply with both state and federal law," and "the state law stands as an obstacle to the accomplishment of the full objectives of Congress." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 78 L. Ed. 2d 443, 104 S. Ct. 615 (1984). In analyzing the preemptive effect of federal legislation, "the purpose of Congress is the ultimate touchstone." *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 84 S. Ct. 219, 11 L. Ed. 2d 179 (1963).

Here, no preemptive effect of the FRCD is demonstrated under the first test requiring complete occupation of a field as Congress specifically provided that an action commenced under CERCLA does not prevent further liability to the state or by operation of state law. 42 U.S.C. § 9614(a). Thus, the potential liability of persons subject to CERCLA's scope of remedies defined by CERCLA is not completely circumscribed by CERCLA. Rather, CERCLA preserves state causes of action for personal injury and property damage and the FRCD by its terms operates on state accrual rules only in cases of personal injury and property damage provided by the FRCD with respect to exposure to hazardous substances as defined by CERCLA.

Nor is there any merit to Defendants' assertion that the FRCD unconstitutionally directs states to regulate in accordance with federal law. Defendants' reliance on *Printz v. United States*, 521 U.S. 898, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997), is misplaced. In *Printz*, the Court held that provisions of the Brady Handgun Violence Protection Act of 1993, 107 Stat. 1536, § 102, requiring state and local law enforcement officials to conduct background checks on prospective handgun purchasers violated the Tenth Amendment, finding the challenged provisions analogous to federal "commandeering of state government" because they compelled the states to implement a federal regulatory program by legislation or executive action. *Printz, supra*, 117 S. Ct. at 2379. Significantly, in *Printz*, the Court held the challenged act impugned the sovereignty of the states by directing the actions of state agents in their official capacities rather than the actions of private citizens. *Printz, supra*, at 2380.

In contrast to the provisions of the Brady Bill vitiated in *Printz*, the FRCD does not compel or direct states or state officials, legislative or executive, to regulate anything. Enforcement of the FRCD does not on its face or in its effect require executive or legislative actions in any form. Instead, the FRCD directs that where state law already provides for a cause of action for personal injury or property damage attributable to an exposure based on defendant's release of a hazardous substance, such cause of action accrues, and thus the applicable statute of limitations commences, no earlier than "the date the plaintiff knew (or reasonable should have known)" that the personal injury or property damages were caused or contributed by such hazardous substance. 42 U.S.C. § 9658(b)(4)(A). Indeed, it remains possible for the states to modify their substantive rules and related statutes of limitations regarding such toxic tort cases as they may find necessary. If, however, the subject of a valid exercise of

congressional power, here toxic tort accrual rules, is preempted by federal law, it is no violation of the Tenth Amendment. *Printz, supra*, 117 S. Ct. at 2381; *New York, supra*, at 166. While as discussed, *supra*, at 26 F. Supp. 2d at 522-523, Congress' decision to utilize state tort actions as a complementary means to achieve the broad objectives of CERCLA may be seen as a form of regulation, it remains the fact that such regulation is permissible as not impinging upon the broad sovereign discretion of state executive and legislative action protected against federal incursion by the Tenth Amendment.

Further, it is well established that where Congress requires access to state courts, no Tenth Amendment violation occurs. *Testa v. Katt*, 330 U.S. 386, 393, 91 L. Ed. 967, 67 S. Ct. 810 (1947) (holding that the policy of the federal law is the prevailing policy in every state, and, as such, a claim based on a valid federal law must be enforced in accordance with the federal law over an established, but conflicting, state policy); *New York, supra*, 505 U.S. at 178-79 (distinguishing between a federal statute which mandates state regulation of an area of law in accordance with federal law and a federal statute which directs state enforcement of a federal law, explaining that federal statutes which were "enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause"). Additionally, the Supreme Court reiterated in *Printz* that the Supremacy Clause permitted Congress to preempt a field of state law. *Printz, supra*, 117 S. Ct. at 2381. It is also well established that Congress may direct state courts adjudicate claims created by federal law. *Howlett v. Rose*, 496 U.S. 356, 369, 374, 110 L. Ed. 2d 332, 110 S. Ct. 2430 (1990)(holding that federal law, as the "law of the Land" is also the law of the states and that "the Supremacy Clause forbids state courts to disassociate themselves from federal law because of

disagreement with its content or a refusal to recognize the superior authority of its source"). As it is permissible for a federal statute representing an exercise of an enumerated power to direct its enforcement by a state court under the Supremacy Clause, it follows that it is permissible for a federal statute, like the FRCD, to direct enforcement by a state court applying state law. Accordingly, the FRCD whether by its preemptive effect or its own terms does not violate the Tenth Amendment.

3. Commencement of Survival and Wrongful Death Actions Without a Duly Appointed Personal Representative of Decedents' Estate

Defendants seek dismissal of the survival and wrongful death actions brought on behalf of several decedents for whom no personal representative has yet been duly appointed.[29] Defendants' Memorandum of Law, at 45-46. Appointment of a proper legal representative of the decedent's estate is a

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[29] At the time their respective actions were commenced, neither Letters Testamentary nor Letters of Administration had been issued to any personal representative for the estates of Evo T. Astor, Loraine R. Brzezicki, Gretchen A. Heaney, Anthony J. Marino, Robert A. Martzolf, Vincent J. Mongiovi, Alfred G. Mucha and Joseph J. Wiedenbeck. The persons suing on behalf of the estates of Isabelle A. Wiedenbeck and Mary M. Sturm were not the "duly appointed estate representatives" for those persons at the time the instant actions were commenced. Additionally, claims were filed on behalf of Charles W. Batt, Rose E. Batt and Joseph A. Inzinna before any estate representative had been appointed by the appropriate Surrogate Court. Defendants' Memorandum of Law, at 45. Plaintiffs do not dispute these facts. Plaintiffs' Memorandum of Law, at 23.

prerequisite to survival and wrongful death actions based on the decedent's personal injuries. *Carrick v. Central General Hospital*, 51 N.Y.2d 242, 414 N.E.2d 632, 636 n. 2, 434 N.Y.S.2d 130 (N.Y. 1980)(under New York law, "it is well established that the existence of a qualified administrator is essential to the maintenance of the action and that the statutory right to recover for wrongful death does not even arise until an administrator has been named through the issuance of letters of administration"); *Mingone v. State*, 100 A.D.2d 897, 474 N.Y.S.2d 557, 560 (App. Div. 2d Dep't. 1984)(survival actions).

Plaintiffs do not dispute that the estates specified by Defendants as subject to the motion are without duly appointed personal representatives. Initially, Plaintiffs stated their intention to voluntarily dismiss the claims for whom no representative of the estate had been duly appointed when such actions were commenced, have personal representatives appointed for those estates, and then recommence those actions within six months of the voluntary dismissal, as permitted under New York Civil Practice Law and Rules § 205(a) ("§ 205(a)"). Plaintiffs' Response in Opposition to Summary Judgment, at 23. Upon reconsideration of § 205(a), however, Plaintiffs indicated, by letter to the court dated October 28, 1997, that they would not voluntarily dismiss those claims, but rather requested the court dismiss such claims in accordance with Defendants' motion. Plaintiffs' change of position was motivated by a more precise reading of § 205(a) which provides

> if an action is timely commenced and is terminated *in any other manner than by a voluntary discontinuance*, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or final judgment upon the merits, the plaintiff . . . may commence a new action upon the same transaction

> or occurrences or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.

N.Y. Civ. Prac. L. & R. § 205(a)(McKinney 1997)(emphasis added).

Accordingly, voluntary dismissal of the claims brought on behalf of decedent's estates for which no personal representative has been duly appointed will preclude Plaintiff from recommencing such actions.

Defendants further argue that because the statutes of limitations for wrongful death and survival actions are not tolled pending the issuance of Letters Testamentary or Letters of Administration, those actions are nonetheless time-barred because the lack of a duly appointed personal representative of those estates is the lack of an essential element of those claims, rendering them nullities *ab initio*, and thus also making § 205(a) irrelevant. Defendants' Memorandum of Law, at 46. Defendants rely on *Baez v. N.Y.C. Health and Hospitals Corp.*, 80 N.Y.2d 571, 607 N.E.2d 787, 592 N.Y.S.2d 640 (N.Y. 1992)(no toll available pending appointment of guardian for infant children distributees where decedent's will named executrix of estate as guardian of her children who could have sought appointment as personal representative to initiate timely action on behalf of children); *Ortiz v. Hertz Corp.*, 212 A.D.2d 374, 622 N.Y.S.2d 260 (App. Div. 1st Dep't. 1995)(wrongful death statute of limitations not tolled as to decedent's minor children pending receipt of letters of administration by legal guardian); and *D'Angelo v. City of New York*, 929 F. Supp. 129, 132 n. 3 (S.D.N.Y. 1996)(two

year statute of limitations tolled until appointment of guardian for infant child, sole estate distributee, but action dismissed as not commenced within two years of such appointment), in support of their position that the statute of limitations is not tolled pending the appointment of the personal representative of an estate, which is required as an essential element to maintain wrongful death and survival actions. Defendants reason, therefore, that even if the FRCD applies to survival and wrongful death actions, the fact that proper representatives were appointed after expiration of the relevant statute of limitations periods renders such claims time barred under applicable New York law.

Assuming, *arguendo*, that the instant claims were timely commenced based on the FRCD, *Baez, Ortiz*, and *D'Angelo, supra*, are distinguishable as in those cases the actions were not commenced by a duly appointed representative of the decedent's estate until *after* the expiration of the statute of limitations and there was thus no prior action to which 205(a) could relate. In contrast, *Carrick, supra*, held that if the action was originally timely commenced with reference to the applicable statute of limitations, albeit improperly for lack of a duly appointed estate representative, § 205(a) may nevertheless be invoked to permit the refiling of such an action upon the subsequent appointment of a representative of the estate. Specifically, the Court of Appeals held that § 205(a) is intended to apply in situations where a prior action is properly dismissed based on some "fatal flaw," including prior actions which contain a "deadly defect," such as a lack of a duly appointed estate representative, an essential element of both survival actions and wrongful death claims. *Carrick, supra*, 414 N.E.2d at 635. Thus, in *Carrick*, the court permitted a duly appointed representative of an estate to recommence survival and wrongful death actions within six months of dismissal of the prior actions, regardless of the

absence of a duly appointed representative when the action was initially commenced.

Although technically one for summary judgment, Defendants' current motion pursuant to Fed.R.Civ.P. 56, reads as a motion pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Specifically, the motion states "because no duly appointed estate representative had been appointed for these decedents . . . when the actions were commenced, the wrongful death and survival actions purportedly asserted on their behalf must be dismissed." Defendants' Memorandum of Law at 46. The court as to this issue therefore treats it as such. Accordingly, the survival and wrongful death claims pertaining to decedents Astor, Brzezicki, Charles Batt, Rose Batt, Heaney, Inzinna, Martzolf, Mongiovi, Mucha and Sturm, as they were filed prior to the appointment of personal representatives of the respective estates, based upon this failure to state a claim under New York law, should therefore be DISMISSED, with leave to re-file in accordance with § 205(a). However, as the court is recommending dismissal of the survival claims pertaining to decedents Marino and Isabelle and Joseph Wiedenbeck based on their having been filed more than one year after the latest possible FRCD, *see* Discussion, *supra*, at 26 F. Supp. 2d at 531, only the wrongful death actions pertaining to those decedents should be DISMISSED with leave to re-file in accordance with § 205(a).

4. Punitive Damages

As stated, the instant Plaintiffs have filed survival actions, wrongful death actions, and claims for loss of consortium. Defendants contend that under New York law, punitive damages are recoverable only if the underlying cause of action supports such an award. Specifically, Defendants argue that if the underlying survival and wrongful death

actions are time-barred, no underlying cause of action remains to support an award of punitive damages. Defendants' Memorandum of Law, at 46-47. Defendants also maintain that the Plaintiffs' punitive damages claims are legally insufficient as punitive damages are not available unless the defendant acted with wrongful intent and with a degree of recklessness similar to criminality. *Id.* at 47-48, *citing* Astor Complaint (Doc. # 1, 95-CV-247E(F)) at P 71. Defendants therefore urge that Plaintiffs' allegations that Defendants' actions "were grossly, recklessly and wantonly negligent and were done with utter disregard for the rights and safety of plaintiffs and other persons similarly situated" should be dismissed. *Id.* Finally, Defendants maintain that at a minimum, Plaintiffs' punitive damages claims for survival actions are barred as to those decedents whose death occurred on or before August 31, 1982 when the New York survival statutes, N.Y. Est. Powers & Trusts Law §§ 5-4.3(b) and 11-3.2(b)(McKinney 1997), were amended to permit punitive damages in survival actions. *See* 1982 N.Y. Laws 100, §§ 1 and 2; Defendants' Memorandum of Law, at 49.

No separate cause of action for punitive damages exists under New York law and, accordingly, punitive damages may be recovered only if such damages are available upon establishing the underlying claim. *Porter v. Allstate Insurance Co.*, 184 A.D.2d 685, 585 N.Y.S.2d 465, 466 (App. Div. 2d Dep't. 1992). However, in this case, as it is not possible at this time to determine whether most of the survival and wrongful death actions will ultimately be found to be timely, Defendants' assertion that all punitive damages claims must be dismissed because the underlying claims are time-barred fails in part.

Chapter 100 of the Laws of 1982 amended N.Y. Est. Powers & Trust Law §§ 5-4.3(b) and 11-3.2(b) to permit recovery of punitive damages in survival and wrongful death actions

where the death of the decedent occurs after August 31, 1982. See 1982 N.Y. Laws 100, §§ 1 and 2. Accordingly, no punitive damages may be recovered in the survival and wrongful death actions pertaining to Evo T. Astor (date of death ("D.O.D.") December 2, 1980), Charles W. Batt (D.O.D. October 7, 1974), Joseph A. Inzinna (D.O.D. October 27, 1976), George Pagels (D.O.D. September 9, 1980), Leo N. Phillips (D.O.D. November 2, 1963), and Mary M. Sturm (D.O.D. December 15, 1966). In contrast, punitive damages may thus, depending on the correct FRCD, be awarded for the survival and wrongful death actions maintained on behalf of those decedents who died after the enactment of New York's punitive damages statutes relating to survival and wrongful death actions, specifically, Rose E. Batt (D.O.D. October 4, 1982), Lorraine R. Brzezicki (D.O.D. August 23, 1992), Mary Jane Farino (D.O.D. September 18, 1991), Robert L. Farino (D.O.D. July 4, 1989), Stephen C. Grandillo (January 6, 1991), Gretchen A. Heaney (D.O.D. April 26, 1984), Nelson M. Hirsch (D.O.D. November 17, 1993), Henry A. Kuczka (D.O.D. July 29, 1985), Robert A. Martzolf (D.O.D. March 23, 1987), Vincent J. Mongiovi (D.O.D. October 31, 1985), and Alfred G. Mucha (D.O.D. November 20, 1986). Punitive damages may also be recovered with regard to the wrongful death actions of pertaining to decedents Anthony J. Marino (D.O.D. February 6, 1988), Isabelle A. Wiedenbeck (D.O.D. August 17, 1993) and Joseph J. Wiedenbeck (D.O.D. July 1, 1991), for whom the survival actions were untimely filed. *See* Discussion, *supra*, at 26 F. Supp. 2d at 531. Defendants' motion for summary judgment dismissing Plaintiffs' punitive damages claim should therefore be GRANTED in part and DENIED in part.

5. Derivative Loss of Consortium Claims

Defendants maintain that Plaintiffs' derivative loss of consortium claims[30] must be dismissed as there is no loss of consortium claim for the death of a spouse in New York. Defendants' Memorandum of Law, at 49. Additionally, Defendants assert that as a loss of consortium claim is derivative in nature, it must be dismissed where the underlying personal injury claim is dismissed. *Id.*

In support of their position, Defendants rely on *Liff v. Schildkrout*, 49 N.Y.2d 622, 404 N.E.2d 1288, 427 N.Y.S.2d 746 (N.Y. 1980), which held that a cause of action for loss of consortium is derivative of a survival action for the marital partner's conscious pain and suffering, but is not derivative, nor may it be asserted as an element of, a wrongful death action. In *Liff*, the court held that such a loss of consortium claim is stated only insofar as a surviving spouse attempts to recover loss of consortium for the period prior to death of the marital partner. *Liff, supra*, 404 N.E.2d at 1291. In response, Plaintiffs maintain that Defendants' summary judgment motion as to this issue is premature as Plaintiff have yet to be permitted to conduct any merit-based discovery which may or may not reveal any basis for such claims. Plaintiff's Memorandum of Law in Response in Opposition to Partial Summary Judgment, at 24.

It is basic that summary judgment may not be entered until the parties have had adequate time to conduct discovery on the merits of the issues presented on such motion. Fed. R.

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[30] The court notes that loss of consortium claims have been asserted only with regard to Evo T. Astor, Henry A. Kuzcka, Anthony J. Marino, Robert A. Martzolf, Vincent J. Mongiovi, Alfred G. Mucha, George Pagels, Leo N. Phillips.

Civ. P. 56(c); *Celotex, supra*, at 322. In the instant case, although Defendants' assertion that no loss of consortium claim may be maintained derivative of a wrongful death action is correct, it is possible that discovery will reveal evidence sufficient to support a loss of consortium claim derivative of decedents' pain and suffering prior to death, *i.e.*, relating to the survival actions, which is permitted under New York law. *Liff, supra*, 404 N.E.2d at 1292. To that extent, Defendants' motion is premature and should be DISMISSED with leave to refile after completion of discovery related to such claims. Such discovery has been effectively stayed by this court's Second CMO.

CONCLUSION

Based on the foregoing, Defendants' motion for partial summary judgment should be GRANTED in part and the survival actions pertaining to decedents Anthony J. Marino, Isabelle A. Wiedenbeck and Joseph J. Wiedenbeck should be DISMISSED. Summary judgment should be DENIED as to the survival actions of Mary Jane Farino, Robert L. Farino, Stephen C. Grandillo, Nelson M. Hirsch, Henry A. Kuczka, George Pagels and Leo N. Phillips. The survival and wrongful death actions commenced on behalf of Evo T. Astor, Charles W. Batt, Rose E. Batt, Loraine E. Brzezicki, Gretchen A. Heaney, Joseph A. Inzinna, Robert A. Martzolf, Vincent-J. Mongiovi, Alfred G. Mucha and Mary M. Sturm, decedents for whom no personal representative had been duly appointed prior to being filed, should be DISMISSED with leave to renew. Summary judgment as to the remaining wrongful death actions should be DENIED. Summary judgment as to the punitive damages claims should be GRANTED in part and DENIED in part and summary judgment as to the claims for loss of consortium should be DENIED.

Pursuant to 28 U.S.C. § 636(b)(1), it is hereby

ORDERED that this Report and Recommendation be filed with the Clerk of the Court.

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of the Court within ten (10) days of receipt of this Report and Recommendation in accordance with the above statute, Rules 72(b), 6(a) and 6(e) of the Federal Rules of Civil Procedure and Local Rule 72.3.

Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the District Court's Order. *Thomas v. Arn*, 474 U.S. 140, 88 L. Ed. 2d 435, 106 S. Ct. 466 (1985); *Small v. Secretary of Health and Human Services*, 892 F.2d 15 (2d Cir. 1989); *Wesolek v. Canadair Limited*, 838 F.2d 55 (2d Cir. 1988).

Let the Clerk send a copy of this Report and Recommendation to the attorneys for the Plaintiffs and the Defendants.

SO ORDERED.

DATED: March 11th, 1998

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK

IN RE: PFOHL BROTHERS LANDFILL LITIGATION;
THIS DOCUMENT RELATES TO ALL ACTIONS

95-CV-0020A(F)

68 F. Supp. 2d 236

September 22, 1999, Decided
September 22, 1999, Filed

COUNSEL:
Baron & Budd, P.C., Frederick M. Baron and Laura J. Van Pelt, of Counsel, Dallas, TX, for Plaintiffs.

Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria LLP, Laraine Kelley, of Counsel, Buffalo, NY, for Plaintiffs.

Nixon, Hargrave, Devans & Doyle LLP, Laurie Styka Bloom, of Counsel, Buffalo, NY, Counsel for the Liaison Group Defendants.

ORDER

ARCARA, District Judge.

This case was referred to Magistrate Judge Leslie G. Foschio, pursuant to 28 U.S.C. § 636(b)(1), on February 16, 1996. On November 5, 1997, defendants filed a motion for partial summary judgment on statute of limitations grounds. On

February 12, 1999, Magistrate Judge Foschio filed a Report and Recommendation, recommending that defendants' motion for partial summary judgment should be denied as to Harry Basinski, Ellen Basinski, Raymond Freier and Rose Freier and granted as to Grace Astor, Kevin Batt, Patricia Batt, Geraldine Davies, Morley Davies, Robert Fiels, Annabel Foisset, Leo Foisset, Carl Forman, Nancy Forman, Raymond Freier, Rose Freier, Tab Fuqua, Helen Hancock, Marlene Lamancuso, Michael Lamancuso, Louis Manolis, Marie Manolis, Donald McKowan, Donna McKowan, Charlotte Mucha, Flora Mueller, Franklin Mueller, William Nielsen, Norman Wagner and Mary Ylmar.

Plaintiffs filed objections to the Report and Recommendation. Oral argument on the objections was held on August 5, 1999.

Pursuant to 28 U.S.C. § 636(b)(1), this Court must make a de novo determination of those portions of the Report and Recommendation to which objections have been made. Upon a de novo review of the Report and Recommendation, and after reviewing the submissions and hearing argument from the parties, the Court adopts the proposed findings of the Report and Recommendation.

Accordingly, for the reasons set forth in Magistrate Judge Foschio's Report and Recommendation,[1] defendants' motion

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[1] The Court notes that in addition to the reasons cited by Magistrate Judge Foschio in his Report and Recommendation, plaintiffs' own expert report appears to indicate that by the end of 1991, plaintiffs had enough information available to them so that they reasonably should of suspected the cause of their respective cancers at that time. See Item No. 563.

for partial summary judgment is: (1) denied as to Harry Basinski (based on his prostrate cancer),[2] Ellen Basinski (loss of consortium claim based on Harry Basinski's claim), Raymond Freier (based on his loss of consortium claim asserted with respect to Rose Freier's personal injury claims limited to her liver and throat cancers), and Rose Freier (based on her personal injury claims limited to her liver and throat cancers); and (2) granted as to Grace Astor, Kevin Batt, Patricia Batt, Geraldine Davies,[3] Morley Davies, Robert Fiels, Annabel Foisset, Leo Foisset, Carl Forman, Nancy Forman, Raymond Freier (as to his personal injury and failure to warn claims), Rose Freier (as to her loss of consortium claim relative to Raymond Freier's personal injury claim), Tab Fuqua, Helen Hancock, Marlene Lamancuso, Michael Lamancuso, Louis Manolis, Marie Manolis, Donald McKowan, Donna McKowan, Charlotte Mucha, Flora Mueller, Franklin Mueller, William Nielsen, Norman Wagner and Mary Ylmar.

The case is referred back to the Magistrate Judge for further proceedings.

IT IS SO ORDERED.

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[2] In their objections, plaintiffs claim that Mr. Basinski's claim is based on colon cancer, not prostrate cancer. The Court will leave this issue for Magistrate Judge Foschio to resolve.

[3] Plaintiffs claim in their objections that Geraldine Davies was diagnosed with bladder cancer in September 1998 and ask that the Court modify the Report and Recommendation so as to deny summary judgment with respect to her bladder cancer claim and Morley Davies' loss of consortium claim with respect thereto. The Court will leave this issue for Magistrate Judge Foschio to resolve.

Dated: September 22, 1999

REPORT AND RECOMMENDATION

FOSCHIO, United States Magistrate Judge.

JURISDICTION

This case was referred to the undersigned by the Honorable Richard J. Arcara on February 16, 1996, for report and recommendation on all dispositive motions. It is presently before the court on Defendants' motion for partial summary judgment (Docket Item Number 343), filed November 5, 1997.

BACKGROUND

This action was commenced on January 10, 1995, by the filing of the first of six essentially identical complaints on behalf of 63 Plaintiffs, suing on behalf of themselves or their respective decedents, in which Plaintiffs seek monetary damages including punitive damages from Defendants for injuries or deaths from various cancers which they contend were caused by exposure to hazardous and toxic substances from the Pfohl Brothers Landfill located in Cheektowaga, New York (the "Landfill").

Originally assigned to Hon. John T. Elfvin, this matter was transferred to Hon. Richard J. Arcara by order dated October 15, 1995. Judge Arcara, by order dated February 16, 1996, consolidated these actions for all pre-trial purposes. That order was also made applicable to any future related cases. The pending summary judgment motion pertains to six separately filed actions including (1) *Frier v. Westinghouse*,

No. 95-CV-20A(F), filed January 10, 1995 ("*Freier*"), which covers the claims pertaining to Plaintiffs Raymond Freier, Tab Fuqua and Charlotte Mucha, (2) *Batt v. Westinghouse*, No. 95-CV-107A(F), filed February 14, 1995 ("*Batt*"), which covers the claims pertaining to Plaintiffs Leo Foisset, Helen Hancock, Flora Mueller, Franklin Mueller and William Nielsen, (3) *Astor v. Westinghouse*, No. 95-CV-247A(F), filed March 29, 1995 ("*Astor*"), which covers the claims pertaining to Plaintiffs Grace Astor, Ellen Basinski, Harry Basinski, Louis Manolis, Marie Manolis and Mary Ylmar, (4) *Davies v. Westinghouse*, No. 95-CV-444A(F), filed June 5, 1995 ("*Davies*"), which covers the claims pertaining to Plaintiffs Kevin Batt, Patricia Batt, Geraldine Davies, Morley Davies, Annabel Foisset, Rose Freier, Donald McKowan, Donna McKowan and Norman Wagner, (5) *Fiels v. Westinghouse*, No. 96-CV-395A(F), filed June 17, 1996 ("*Fiels*"), which covers the claims of Plaintiffs Robert Fiels, Carl Forman and Nancy Forman, and (6) *Anthony v. Westinghouse*, No. 97-CV-19A(F), filed January 10, 1997 ("*Anthony*"), which covers the claims pertaining to Plaintiffs Marlene Lamancuso and Michael Lamancuso.[4] [5]

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[4] As filed, the summary judgment motion also seeks to dismiss loss of consortium claims originally asserted by Patricia Wagner in *Davies* and by Delores Fiels in *Fiels*. However, those two claims have voluntarily discontinued by Plaintiffs. See Decision and Order dated August 31, 1998 (Docket Item Number 504) at 27-28.

[5] A seventh action, *Minier v. Westinghouse*, 98-CV-560A(F) was commenced on September 8, 1998, in which Jeff Minier as Executor of the Estate of Arthur Minier and Jean Minier, as surviving spouse of Arthur Minier, allege causes of action including personal injury, failure to warn, wrongful death and loss of consortium based on Arthur Minier's cancer and death which allegedly were caused by

(Footnote continued on next page)

The personal injury claims are based on New York law negligence, strict liability, gross negligence, wrongful death, loss of consortium and failure to warn. The instant actions are being maintained by Plaintiffs who were alive when their complaint were first filed as well as estate representatives on behalf of five Plaintiffs who died since suit was commenced. Plaintiffs allege that they lived, worked or engaged in recreational activity in the vicinity of the Landfill and that Defendants either owned and operated the Landfill or were otherwise responsible for the generation or transportation of the hazardous substances to the Landfill. Federal subject matter jurisdiction is based on diversity of citizenship.

The instant motion seeks summary dismissal of the personal injury, failure to warn, wrongful death and loss of consortium claims asserted on behalf of 28 Plaintiffs, most of which would be time-barred under New York law. Plaintiffs urge that these claims are nevertheless timely under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601 *et seq.*, ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), 100 Stat. 1613, specifically, § 309, codified as 42 U.S.C. § 9658 ("§ 9658"), which, by preempting the accrual date for state law toxic tort actions based on exposure to hazardous substances released into the environment by facilities as defined by CERCLA, permits such claims to accrue upon the discovery of the cause

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(Footnote continued from previous page)
exposure to hazardous and toxic substances deposited into the Landfill. As this action was commenced after the instant summary judgment motion was filed, those claims are not before the court on summary judgment.

of the injury.[6] Pursuant to § 9658, a toxic tort action accrues upon the federally required commencement date ("FRCD"), which is the date the cause of a plaintiff's injury is, or with reasonable diligence should be, discovered. On February 16, 1996, Defendants were granted a period of discovery limited to their statute of limitations defense.

On June 11, 1997, Defendants filed a motion for partial summary judgment seeking dismissal of the survival and wrongful death actions on behalf of 20 decedents and the consortium on behalf of eight surviving spouses as time-barred under the applicable New York statutes of limitations and challenging the applicability and constitutionality of § 9658. In a Report and Recommendation issued on March 11, 1998, adopted by Judge Arcara on October 27, 1998, the court found, *inter alia*, that although some of the survival actions were barred under New York limitations statutes, the specific New York statute applicable to accrual of toxic tort actions was partially preempted by the FRCD and that the FRCD violated neither the Commerce Clause nor the Tenth Amendment. *In re Pfohl Brothers Landfill Litigation*, 26 F. Supp. 2d 512 (W.D.N.Y. 1998) ("*Pfohl I*"). Summary judgment was denied as a genuine issue of material fact as to the correct FRCD existed. *Id.*

On November 5, 1997, Defendants moved for summary judgment to dismiss the personal injury and loss of consortium claims of the surviving Plaintiffs, asserting that § 9658 is unconstitutional, inapplicable to the instant claims, or, if applicable, that it does not render these actions timely

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[6] For convenience, the court refers to an action based on an exposure to an alleged hazardous substance as a "toxic tort."

as the causes of action accrued earlier than Plaintiffs assert.[7] Plaintiffs filed their responses on December 24, 1997 and Defendants replied on January 20, 1998. Oral argument was deemed unnecessary.

Between October 28, 1997 and November 7, 1997, Plaintiffs made six motions to amend the six separate complaints filed in *Freier, Batt, Astor, Davies, Fiels* and *Anthony*. Those motions became moot on December 11, 1997 when Plaintiffs filed amended motions to amend the complaints. On August 31, 1998, thee motions were granted insofar as they sought to (1) dismiss four Defendants, namely W.S. Tyler, Inc., Browning-Ferris Industries, Inc., Waste Management, Inc., F.N. Burt Company, and Litton Services, Inc., (2) to dismiss loss of consortium claims asserted by two Plaintiffs, (3) assert a failure to warn claims, (4) amend the factual allegations of the complaints as to when the cause of Plaintiffs' injuries was discovered, (5) with respect to five Plaintiffs who had died since commencing suit, Rose Freier, Annabel Foisset, Leo Foisset, Helen Hancock and Louis Manolis, substitute representatives of such deceased Plaintiffs' estates as Plaintiffs, and (6) assert wrongful death claims on behalf of the now deceased Plaintiffs. The remaining allegations contained in the original complaints were unchanged. Plaintiffs filed the amended complaints on October 1, 1998. (Docket Items Numbers 511 (*Anthony*), 512

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[7] Defendants did not argue in support of their previous summary judgment motion (*see Pfohl I* at 529 n. 15) seeking dismissal of the survival and wrongful death action that those claims were untimely even if the FRCD is constitutional and applicable to the state toxic tort claims and, accordingly, the court did not consider whether, as requested by the instant motion, those claims were nonetheless untimely despite the FRCD's applicability.

(*Freier*), 513 (*Davies*), 514 (*Batt*), 515 (*Fiels*) and 516 (*Astor*)).

As noted, the instant motion seeks summary dismissal of the personal injury claims asserted as to 20 Plaintiffs, specifically Grace Astor, Harry Basinski, Kevin Batt, Geraldine Davies, Robert Fiels, Annabel Foisset, Leo Foisset, Nancy Forman, Raymond Freier, Rose Freier, Tab Fuqua, Helen Hancock, Michael Lamancuso, Louis Manolis, Donna McKowan, Charlotte Mucha, Franklin Mueller, William Nielsen, Norman Wagner and Mary Ylmar. Dismissal of claims for loss of consortium brought by Ellen Basinski, Patricia Batt, Morley Davies, Delores Fiels, Leo Foisset, Annabel Foisset, Carl Forman, Rose Freier, Raymond Freier, Marlene Lamancuso, Marie Manolis, Donald McKowan, Flora Mueller and Patricia Wagner is also sought.[8] See Amended Complaints filed in *Anthony* (Docket Item Number 511), at P 32, *Freier* (Docket Item Number 512), at P 30, *Davies* (Docket Item Number 513), at P 33, *Batt* (Docket Item Number 514), at P 36, *Fiels* (Docket Item Number 515), at P 30 and *Astor* (Docket Item Number 516) at P 32.

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[8] Six Plaintiffs have died since suit was commenced including Ellen Basinski who maintained a loss of consortium claim relative to her husband Harry Basinski's personal injury claim, and Annabel Foisset, Leo Foisset, Rose Freier, Helen Hancock and Louis Manolis who maintained personal injury and failure to warn claims on their own behalf. As those Plaintiffs were alive when their particular actions were filed, dismissal of their claims is properly sought by this motion for summary judgment rather than the earlier summary judgment motion which pertained to wrongful death and survival actions asserted on behalf of persons who were deceased prior to commencing legal action. *See* Discussion, *infra*, at 20.

According to the amended complaints, Plaintiffs allege that the FRCD, *i.e.*, the earliest date on which it became possible to discover the cause of their injuries is December 1994.

For the reasons which follow, Defendants' motion for partial summary judgment should be DENIED as to Harry Basinski (based on his prostate cancer), Ellen Basinski (based on her loss of consortium claim), Raymond Freier (based on his loss of consortium claim asserted with respect to Rose Freier's personal injury claims limited to her liver and throat cancers) and Rose Freier (based on her personal injury and failure to warn claims limited to her liver and throat cancers), and GRANTED as to Grace Astor, Kevin Batt, Patricia Batt, Geraldine Davies, Morley Davies, Robert Fiels, Annabel Foisset, Leo Foisset, Carl Forman, Nancy Forman, Raymond Freier (as to his personal injury and failure to warn claims), Rose Freier (as to her loss of consortium claim relative to Raymond Freier's personal injury claim), Tab Fuqua, Helen Hancock, Marlene Lamancuso, Michael Lamancuso, Louis Manolis, Marie Manolis, Donald McKowan, Donna McKowan, Charlotte Mucha, Flora Mueller, Franklin Mueller, William Nielsen, Norman Wagner and Mary Ylmar.

FACTS[9]

The Landfill encompasses 120 acres of the northeastern corner of the town of Cheektowaga, New York, a suburban area adjacent to the City of Buffalo. Since 1983, the Landfill has been listed on the New York State Registry of Active Hazardous Waste Disposal Sites, indicating that the state considers the Landfill to be a public health threat. It is

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[9] The fact statement is taken from the complaints, answers, and other papers filed in this action.

undisputed that industrial wastes including hazardous substances were deposited into the Landfill between 1932 and 1969. Three tributaries to Ellicott Creek flow through the landfill and Aero Lake is adjacent to the northwestern corner of the Landfill.

Many of the Plaintiffs claim that over a number of years they regularly hunted, biked, and walked in the vicinity of the Landfill. Children often played in the Landfill and built "play forts" out of debris found there. Some Plaintiffs stated at their depositions to crossing the Landfill on their way to Aero Lake where they swam and fished. Most Plaintiffs admitted that they observed landfill waste, including leaking, rusting barrels, discarded x-rays, and what appeared to be chemical deposits, and some admitted that they removed items from the Landfill for personal household use. Many of the Plaintiffs who reside in the vicinity of the Landfill reported that their property was occasionally flooded when Ellicott Creek overflowed.

Plaintiffs in this action have filed claims based on negligence, strict liability, gross negligence, failure to warn, loss of consortium, and wrongful death for injuries or deaths to their respective decedents whose deaths they contend were caused by exposure to hazardous and toxic substances in the Landfill. The Pfohl Defendants are the owners and were the operators of the Landfill as well as the companies which assertedly generated and transported the hazardous and toxic substances to the Landfill. According to Plaintiffs, Defendants' negligence is based upon their failure to take adequate precautionary measures to properly contain and prevent the hazardous substances deposited into the Landfill from escaping and migrating out of the Landfill and its surrounding area where Plaintiffs and their decedents resided, as well as their failure to warn Plaintiffs of the danger the Landfill posed to their health. Plaintiffs allege exposure

occurred through contact with the ambient air and ground water when their decedents lived, worked or engaged in recreational activity in the vicinity of the Landfill.

Among the toxic substances allegedly deposited in the Landfill are polychlorinated biphenol ("PCB") oils, acetone, trichloroethane, 3-tricloroethane, perchloroethylene, trichloroethylene, tetrachloroephylene, coolant oil, paint treatment, waste cutting oils, degreasing materials, hydraulic oil, waste paint, industrial wastes, fluorinated solvent waste, cobalt, mercury, toluene, vinyl toluene, benzene, xylene, methylene fluoride, lead, lead driers, calcium, cadmium, zinc oxide, curing sulfur, dry metal dust, sand blast grit, foundry wastes, pine tar pitch, pickling solutions, titanium tetrachloride, polyvinyl alcohol film wastes, polyvinyl chloride, naptha, mek, waste inks, heavy metal wastes, paint thinners, paint solvents, industrial solvents, zirconium sludge, phenolic sludges, and paint sludges such as zinc, tin, chrome, iron, nickel, copper, asbestos, phenol, and fly ash.

Defendants who operated manufacturing facilities within the Western New York region and who it is alleged negligently released and disposed of hazardous substances into the Landfill include Westinghouse Electric Corporation during the years 1946 through 1969, General Motors Corporation from the 1950's through 1968, Curtiss-Wright Corporation during the years 1947 through 1966, Laidlaw Waste Systems, Inc., individually, and as successor in interest to U.S. Rubber Reclaiming Co., Inc., during the 1950's and 1960's, Warner Lambert Company, through its subsidiary American Optical, during the 1950's and 1960's, American Standard, Inc., during the 1950's and 1960's, Howden Fan Company, f/k/a/ Buffalo Forge, during the 1950's and 1960's, Carborundum Company for the time period 1951 through 1967, and E.I. Dupont deNemours, from 1955 through 1968.

Defendants who it is alleged negligently transported and deposited hazardous substances into the Landfill include Rapid Disposal Services, Inc., and Niagara Sanitation Company, Inc., during the 1950's and 1960's,[10] and Dresser Industries, Inc., during the 1950's and 1960's.

Plaintiffs allege that the cause of their cancers were not discovered before December 1994. This allegation is based in part on the issuance of the Pfohl Environmental Health Study prepared in 1994 by David A. Rigle, M.D. and William R. Sawyer, Ph.D., ABFE ("the Rigle-Sawyer Report"), at the request of Plaintiffs' attorneys. Plaintiffs maintain that it was only when the results of the Rigle-Sawyer Report were shared with them in 1994 and 1995 that they believed a connection between the hazardous and toxic substances deposited in the Landfill and their cancers existed.

DISCUSSION

Summary judgment of a claim or defense will be granted when the moving party demonstrates that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a) and (b); *Celotex Corp. v. Catrett*, 477 U.S. 317, 331, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Rattner v. Netburn*, 930 F.2d 204, 209 (2d Cir. 1991). The moving party for summary judgment bears the burden of establishing the nonexistence of genuine issue of material fact. If there is any evidence in the record based upon any source from which a reasonable inference in the nonmoving

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[10] These companies were subsequently acquired by Browning-Ferris, Inc.

party's favor may be drawn, the moving party cannot obtain a summary judgment. *Celotex, supra*, at 331.

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no issue as to any material fact, and the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson, supra*, 477 U.S. at 247-48.

Defendants have moved for partial summary judgment seeking dismissal of the claims of 28 Plaintiffs on statute of limitations grounds, arguing such claims are time-barred because § 9658 does not apply to the asserted causes of action, and, alternatively, that the statute is unconstitutional as beyond the scope of congressional legislative power under the Commerce Clause and violates the Tenth Amendment. Defendants further assert that Plaintiffs' loss of consortium claims must be dismissed as they are derivative of the underlying survival actions on which they are based and therefore are also time-barred. Finally, Defendants argue that the claims for punitive damages must be dismissed as such claims are both legally insufficient and their timeliness is dependent on the underlying time-barred personal injury and loss of consortium claims.

The court will therefore first determine whether Plaintiffs' claims are time-barred under relevant state law and if so, whether § 9658 is applicable and, to the extent applicable, its preemptive effect on New York law. If the state law is preempted, the court will examine whether Defendants' argument that even if § 9658 pertains to these actions they

are, nevertheless, untimely as the FRCD occurred no later than the end of 1991. The court will also again address the constitutionality of § 9658.[11] Finally, the court will determine whether Plaintiffs' loss of consortium and punitive damages claims may proceed.

1. Statute of Limitations

The timeliness of a claim in federal court under diversity jurisdiction, 28 U.S.C. § 1332(a), is governed by the statute of limitations for the state in which the court sits. *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 109-110, 89 L. Ed. 2079, 65 S. Ct. 1464 (1945); *Personis v. Oiler*, 889 F.2d 424 (2d Cir. 1989). Accordingly, this analysis begins with an application of the relevant New York statutes of limitations. Based on this analysis, the court finds that most of Plaintiffs' claims are time-barred.

a. The Timeliness of Plaintiffs' Claims under New York Law

In New York, the general limitations period for personal injury torts, including personal injury and survival actions, based on negligence, strict liability, gross negligence and loss of consortium is three years measured from the date of the injury. N.Y. Civ. Prac. L. & R. § 214(5) (McKinney, 1990)("§ 214(5)"). This so-called "first exposure rule" was judicially established in *Schmidt v. Merchants Despatch*

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[11] The court previously found that § 9658 was constitutional in the Report and Recommendation issued with regard to the previous summary judgment motion. *Pfohl I*, at 539-46. That Judge Arcara agreed with the court's finding is evident by his adoption of the findings contained in that Report on October 27, 1998. *Phohl I* at 516.

Transp. Co., 270 N.Y. 287, 200 N.E. 824 (N.Y. 1936), and remains, for most torts, the traditional rule in New York. *Blanco v. American Telephone and Telegraph Co.*, 90 N.Y.2d 757, 689 N.E.2d 506, 509, 666 N.Y.S.2d 536 (N.Y. 1997)(holding that a cause of action in a case of latent injuries accrues under the traditional rule upon plaintiff's initial exposure).

In the case of toxic torts, under § 214(5), the date of first exposure to the hazardous substance would ordinarily be the infliction of the initial injury. *Blanco, supra, Schmidt, supra.* Here, Plaintiffs seek recovery for their own, or their decedents', injuries based on exposure to toxic substances that first occurred between 1917 and 1976. Defendants' Exhibit 7-13, and 9-15,[12] respectively. All the instant actions are thus untimely under § 214(5) as more than three years have passed since the date of first exposure to the alleged

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[12] Defendants, in support of the instant motion for summary judgment, submitted seven volumes of exhibits containing a total of 69 exhibits with each page of each exhibit separately numbered. Likewise, Plaintiffs, in opposition to the instant motion, submitted eight volumes of exhibits containing a total of 40 exhibits with each page of each exhibit separately numbered. In the interests of clarity and convenience, the court refers to each exhibit by referencing the exhibit number followed by the exhibit's specific page number. For example, "Defendants' Exhibit 1-2" refers to page 2 of Exhibit 1 submitted in Support of Liaison Group Defendants' Consolidated Motion for Partial Summary Judgment, filed November 5, 1997 (Docket Item Number 344). Similarly, "Plaintiffs' Exhibit 1-2" refers to page 2 of Exhibit 1 submitted in Support of Plaintiffs' Response to Liaison Groups Defendants' Consolidated Motion for Partial Summary Judgment, filed December 24, 1997 (Docket Item Number 408).

toxic substances and the filing of Plaintiffs' complaints in 1995, 1996 and 1997.

As the first exposure rule barred many plaintiffs from commencing actions for injuries caused by latent effects of exposure to hazardous and toxic substances, usually over a long period of time, before discovering their resulting injuries and the causes thereof, in 1986 New York enacted Section 214-c of the New York Civil Practice Law and Rules ("CPLR") which established, for toxic tort cases, special accrual rules and limitations periods effectively providing more time for plaintiffs to file claims seeking damages for injuries and deaths attributed to exposure to such substances. Under § 214-c(2), a three year statute of limitations applies to actions in which recovery is sought "for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances . . . computed from the date of the discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier." N.Y. Civ. Prac. L. & R. 214-c (2)(McKinney 1990)("§ 214-c(2)") (emphasis added).

Here, Plaintiffs seek recovery based on cancers, the earliest of which was discovered in 1963, Defendants' Exhibit 1-3, and the latest of which was discovered in December 1995.[13] Defendants' Exhibit 10-19. An examination of all the relevant exhibits submitted on this motion demonstrates that Plaintiffs' claims are all untimely under § 214-c(2) except the claims of Plaintiffs Harry Basinski and Rose Freier.

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[13] It is assumed only for the purposes of this Discussion that the diagnosis of each Plaintiff's cancer coincided with the discovery of such injury, a fact which has yet to be established by either party

Specifically, Harry Basinski was diagnosed with throat cancer in February 1992 and prostate cancer in 1994, Defendants' Exhibit 2-6, and Rose Freier was diagnosed with lung cancer in 1984, liver cancer in 1994 and throat cancer in 1995. Defendants' Exhibit 10-19. Only the claims arising from Mr. Basinski's prostrate cancer which was diagnosed in 1994, and the claims based on Mrs. Freier's liver and throat cancers, respectively discovered in 1994 and 1995, are timely under § 214-c(2) as all such claims were filed within three years of the discovery of their injuries. However, the actions of both Mr. Basinski and Mrs. Freier are untimely under § 214-c(2) insofar as Mr. Basinski's action is predicated on his discovery of throat cancer in 1992, and Mrs. Freier's action is based on her discovery of lung cancer in 1984.

Further, pursuant to N.Y. Civ. Prac. L. & R. § 214-c (4)(McKinney 1990 & Supp. 1997)("§ 214-c(4)"), where a prospective plaintiff discovers his injury but is unaware of the cause until more than three years after discovery of such injury thus rendering the action untimely under § 214-c(2), "an action may be commenced or a claim filed within one year of such discovery of the cause of the injury," provided less than five years have elapsed since the discovery of the injury. § 214-c(4) (emphasis added). Additionally, reliance on § 214-c(4) requires that the plaintiff "allege and prove that technical, scientific or medical knowledge and information sufficient to ascertain the cause of his injury had not been discovered, identified, or determined prior to the expiration of the period within which the action or claim would have been authorized . . .." § 214-c(4); Practice Commentary to N.Y. Civ. Prac. L. & R. § 214-c(4), p. 634-35 (McKinney 1990) (commenting that § 214-c(4) requires a plaintiff to establish "that the state of medical or scientific knowledge was such that causation of his injury could not have been identified within the three-year period prescribed [under § 214-c(2)]."

Here, all Plaintiffs assert that they discovered the cause of their decedents' injuries in 1994. See Exhibits 1-20. Accordingly, the remaining actions are timely only if filed within one year of the discovery of the causes of such injuries and if Plaintiffs establish that the state of medical, technological and scientific knowledge and information was insufficient such that it was not possible to discover the cause of their injuries within time to commence the instant actions within three years from the discovery of their cancers. Also, as 1994 is the asserted date of discovery of the cause of the injuries pertaining to all these actions, the actions commenced with the filing of the *Fiels* complaint on June 17, 1996 or the *Anthony* complaint on January 10, 1997 were not filed within the one year limitations measured from the discovery of the alleged cause of death as required under § 214-c(4), and thus, even if § 9658 applies, are nevertheless time-barred under New York law.[14] Accordingly, § 214-c(4) applies, if at all, only to the personal injury, failure to warn, loss of consortium, and survival and wrongful death actions predicated on the cancers of Grace Astor, Harry Basinski (with regard to his throat cancer diagnosed in 1992), Kevin Batt, Annabel Foisset, Leo Foisset, Raymond Freier, Rose Freier (with regard to her lung cancer diagnosed in 1984), Tab Fuqua, Helen Hancock, Louis Manolis, Donna McKowan, Geraldine Morley, Charlotte Mucha, Franklin Mueller, William Nielsen, Norman Wagner and Mary Ylmar.

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[14] Although the court has, as this point, determined that any of the claims asserted in *Fiels* or *Anthony* are time-barred even with the benefit of the FRCD and need not be further discussed, as the instant summary judgment motion is before the court for a Report and Recommendation, in the interest of completeness, such claims are considered in the balance of this Discussion.

b. The FRCD Applies to Personal Injury Actions under New York Law

As most of the personal injury, loss of consortium, failure to warn, survival actions and all the wrongful death actions are time-barred under New York law, Plaintiffs assert that the timeliness of their claims are governed by § 9658. It is undisputed that this federal enactment neither creates a separate federal cause of action based on toxic torts within its terms nor a uniform statute of limitations for such torts; rather, it provides a uniform accrual date from which the applicable state period of limitation governing the relevant claim is measured. 42 U.S.C. § 9658(a)(4)(B). The FRCD therefore effectively creates federally mandated discovery rule for accrual of state law claims involving releases of hazardous substances that cause or contribute to personal injury. *Pfohl I*, at 522; *Kowalski v. Goodyear Tire and Rubber Co.*, 841 F. Supp. 104 (W.D.N.Y. 1994).

Defendants have incorporated by reference their arguments on this same issue in *Pfohl I*. Liaison Group Defendants' Memorandum of Law in Support of Consolidated Motion for Partial Summary Judgment filed November 5, 1997, (Docket Item Number 346) ("Defendants' Memorandum of Law") at 8 (citing Liaison Group Defendants' Memorandum of Law in Support of Consolidated Motion for Partial Summary Judgment filed June 10, 1997, (Docket Item Number 290) ("Defendants' *Pfohl I* Memorandum of Law"), at 25-26. Defendants maintain that the FRCD statute is inapplicable to toxic tort actions brought under New York law as the relevant New York statute of limitations does not provide for a commencement date which is earlier than the FRCD. Under § 214-c(4), if the cause of the injury is not discovered in time for a toxic tort action to be commenced under § 214-c(2), an additional one year limitations period is provided within

which to commence such action measured from the earlier of the date the cause of the injury was, or which with reasonable diligence should have been, discovered. Defendants' *Pfohl I* Memorandum of Law at 25. Thus, Defendants argue that both § 9658 and § 214-c(4) provide for the same commencement of the limitations period, *i.e.*, the day any Plaintiff discovered, or reasonably should have discovered, the cause of the injuries for which relief is sought. Defendants' *Pfohl I* Memorandum of Law at 25-26.

Defendants, however, overlook the fact that § 214-c(4) is limited to those instances where less than five years have elapsed since the discovery of the injury. Because the § 214-c(4) five year limitation operates to defeat Plaintiffs' claims, it is not an irrelevant issue. As the court found in *Pfohl I*, § 9658 has preempted § 214-c(4) to render it consistent with federal law by overriding the proviso to § 214-c(4) limiting the benefit of the extra year within which to file a toxic tort claim to a maximum period of five years from discovery of the injury. *Pfohl I*, at 530-31. Significantly, the FRCD does not displace § 214-c(4)'s one year limitations period. *Pfohl I*, at 531.

Defendants also argued in support of the prior motion that even if the court finds that the FRCD preempts the specific accrual rules established by § 214-c, as § 214-c applies only to those acts which occurred on or after July 1, 1986, Defendants' *Pfohl I* Memorandum of Law, at 15-16, no Plaintiff for whom the injury was discovered prior to July 1, 1986, and for which injury more than three years had elapsed between the date of exposure and July 1, 1986, can invoke any part of § 214-c, and thus the FRCD, to demonstrate the required timeliness of such claim. Defendants' *Pfohl I* Memorandum of Law, at 15-16.

However, as the court found in *Pfohl I*, although CPLR § 214-c(6) restricts the applicability of the new limitations period under § 214-c, the FRCD preserves all claims brought in a state court after CERCLA's effective date, December 11, 1980, and § 9658 overrides § 214-c(6) as the instant claims were all commenced in either 1995, 1996 or 1997. Accordingly, the instant claims were not time-barred under § 214-c(6),[15] and receive the benefit of the more favorable statute of limitations under § 214-c, as preempted by the § 9658.[16] *Pfohl I* at 531-32.

In the Report and Recommendation issued with respect to the prior motion seeking dismissal of the claims commenced on behalf of decedents who died before suit was commenced, the court considered that fact that most of those Plaintiffs had asserted December 19, 1994 as the correct FRCD. Such assertion was attributed to a meeting held on December 19, 1994 at which Plaintiffs' attorneys shared the results of the Rigle-Sawyer Report with them. Those Plaintiffs thus

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[15] The FRCD by its terms preempts § 214-c(6) from being applied to disallow a toxic tort claim where more than three years have run from the time a plaintiff knew or should have discovered the injury prior to 1986 as § 214-c(6) does not apply where the cause of the injury is discovered after the FRCD's effective date of December 11, 1980.

[16] The fact that the FRCD allows some toxic tort claims to be pursued if filed after December 11, 1980 does not imply that all such claims based on pre-1980 exposures remain viable. Thus, any toxic tort claims which may have been litigated and judicially determined to be time-barred could not be relitigated under the FRCD as such claims would necessarily have been based on the plaintiffs' awareness of both the asserted injury and its cause. These claims would be definition be excluded from the FRCD.

maintain that December 19, 1994 is the first date that adequate information was available for any Plaintiff to learn the cause of his cancer. The court found the date that Plaintiffs' admission that sufficient information was available on December 19, 1994 for any one Plaintiff to "know" the cause of his injury indicates that sufficient information was available on December 19, 1994 for all Plaintiffs to know the cause of their injuries. Pfohl *I* at 531. As such, December 19, 1994 was the latest possible FRCD for the accrual of any claim whose timeliness depends on the FRCD. *Id.* That finding applies with equal force to the instant claims.

c. Survival and Wrongful Death Actions

As stated, six Plaintiffs who were alive when these actions were commenced have since died, namely, Ellen Basinski, Annabel Foisset, Leo Foisset, Rose Freier, Helen Hancock and Louis Manolis. The actions of all those deceased Plaintiffs, except for Mrs. Basinski whose action was limited to loss of consortium based on her husband's cancer, are now maintained as survival actions by representatives of the decedents' estates who have also added wrongful death claims. To date, there has been no substitution of a representative of Mrs. Basinski's estate to continue her claim.

An essential element of both survival and wrongful death claims is that the decedent have died with a viable cause of action against the infliction of the injury which caused the death. N.Y. Est. Powers & Trust Law §§ 11-3.2 (survival actions) and 5-4 (wrongful death). Unlike *Pfohl I*, in which the court was required to consider whether § 9658 applied to survival and wrongful death actions where the injured persons died before it was possible to know the cause of their injuries, no similar analysis is required here as these actions were commenced by Plaintiffs who acquired such knowledge before their deaths. Accordingly, the timeliness of the instant

survival and wrongful death actions is based solely on whether the newly deceased Plaintiffs' actions were timely filed, and thus viable, before their deaths.

2. The Timeliness of Plaintiffs' Claims Given the Benefit of the FRCD

Defendants assert that summary judgment should be granted as to the instant claims as sufficient public information existed such that Plaintiffs, had they fulfilled their obligation to exercise due diligence, would have discovered the cause of their injuries prior to 1992. Defendants' Memorandum of Law. Plaintiffs argue that summary judgment should be denied as genuine issues of material fact exists as to when each Plaintiff knew or should reasonably have known that their respective cancers were caused by the Landfill, particularly in light of the number of possible causes of cancer, the fact that no Plaintiff ever received medical or scientific advice that his cancer may be attributed to the Landfill, as well as the competing policies of statutes of limitations and the discovery rule. Plaintiffs' Memorandum of Law at 14. Defendants reply that Plaintiffs have failed to demonstrate that they could not have determined the cause of their injuries prior to 1992. Defendants' Reply Memorandum of Law at 10.

As discussed, the timeliness of the claims pertaining to Harry Basinski based on his prostate cancer as well as to Rose Freier based on her liver and throat cancers do not depend on § 9658 as they were filed within three years of the date of their discovery and thus are timely under § 214-c(2). Further, all Plaintiffs' remaining claims filed in 1996 and 1997 are untimely even with the benefit of § 9658 as they were filed more than three years after discovery of the relevant cancers and more than one year after the asserted FRCD of December 1994. The court thus must consider whether the remaining

personal injury, failure to warn, loss of consortium, and survival and wrongful death actions predicated on the cancers of Grace Astor, Harry Basinski (with regard to his throat cancer diagnosed in 1992), Kevin Batt, Annabel Foisset, Leo Foisset, Raymond Freier, Rose Freier (with regard to her lung cancer diagnosed in 1984), Tab Fuqua, Helen Hancock, Louis Manolis, Donna McKowan, Geraldine Morley, Charlotte Mucha, Franklin Mueller, William Nielsen, Norman Wagner and Mary Ylmar, are timely under § 214-c(4) as filed within one year of the date the cause of their respective cancers should reasonably have been discovered.

a. Burden of Proof

Preliminarily, the court considers Plaintiffs' argument that Defendants seek to hold Plaintiffs to a higher standard of proof than is required on a motion for summary judgment. Plaintiffs' Memorandum of Law at 8. Specifically, Defendants have argued that to defeat summary judgment on a statute of limitations issue, Plaintiffs must establish by competent evidence that their claims were timely commenced as they neither knew, nor could reasonably have known, more than three years before the first action was commenced on January 10, 1995 (*Freier*), that their injuries might be caused by exposure to toxic substances deposited into the Landfill[17]. Defendants' Memorandum of Law at 9-10.

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[17] Although Defendants maintain that it is the one year limitations period under § 214-c(4) that is relevant to these claims, Defendants, in an abundance of caution should the court decide that the three year limitations period under § 214-c(2) is applicable, nevertheless argue that the cause of Plaintiffs' cancers could have been determined more than three years before the first action was filed. Defendants' Reply Memorandum of Law at 2 n. 3.

Courts are not permitted to weigh evidence in deciding motions for summary judgment, *Rodriguez v. City of New York*, 72 F.3d 1051, 1061 (2d Cir. 1995), as the purpose of summary judgment is to identify the existence of a genuine disputed issue of materiality for trial, *Gallo v. Prudential Residential Services, Limited Partnership*, 22 F.3d 1219, 1224 (2d Cir. 1994), so as to exclude from going to trial issues which cannot be substantiated. *Raskin v. Wyatt Co.*, 125 F.3d 55, 66 (2d Cir. 1997).

Where however, as here, the nonmoving party (Plaintiffs) bears the ultimate burden of proof on a dispositive issue, Fed.R.Civ.P. 56(e) requires the nonmoving party to go beyond the pleadings and, by affidavits, depositions, answers to interrogatories, or admissions on file, "designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corporation v. Catrett*, 477 U.S. 317, 323-24, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986) (quoting Fed.R.Civ.P. 56). The Second Circuit has interpreted Rule 56 as requiring that, to defeat summary judgment, the nonmoving party must come forward with evidence sufficient to support a jury verdict in its favor once a party moving for summary judgment has made a properly supported showing to suggest the absence of any genuine issue as to all material fact. *Goenaga v. March of Dimes Birth Defects Foundation*, 51 F.3d 14, 18 (2d Cir. 1995).

Accordingly, to survive summary judgment, as Plaintiffs rely on the FRCD to push forward the accrual of § 214-c(4), Plaintiffs must show, either by evidence admissible at trial or reducible to such evidence, that a material issue of fact exists as to the earliest time when they should have reasonably discovered the cause of their alleged injury making their claims timely under § 214-c(4) as modified by § 9658. *ABB*

Industrial Systems, Inc. v. Prime Technology, Inc., 120 F.3d 351, 357 (2d Cir. 1997); *Celotex, supra*, at 323.

b. Summary Judgment May Be Granted on Statute of Limitations Grounds

Plaintiffs assert that when the Plaintiffs knew or should have known the cause of their injuries is not a proper question to be resolved on summary judgment. Plaintiffs' Memorandum of Law at 9-10. However, contrary to that assertion, courts in this circuit have decided such issues on summary judgment. *See, e.g., Bell South Telecommunications, Inc. v. W.R. Grace & Co.*, 77 F.3d 603, 615 (2d Cir. 1996) (dismissing claim on summary judgment where evidence established that it was time-barred under Connecticut discovery statute); *Griffin v. Garratt-Callahan Co.*, 74 F.3d 36, 39 (2d Cir. 1996) (holding on summary judgment that claims time-barred under § 214-c(2) because the evidence submitted established that the plaintiff knew or reasonably should have known the cause of his injuries earlier than asserted); *Humphreys v. Humphreys*, 949 F. Supp. 1014, 1019-20 (E.D.N.Y. 1997) (finding on summary judgment that claims were time-barred because plaintiff should have discovered cause of her injuries earlier). Accordingly, the court may properly consider on Defendants' motion when Plaintiffs knew, or reasonably should have known, the cause of their cancers.

c. Commencement of the Statute of Limitations under § 214-c(4) as Preempted by § 9658

Plaintiffs maintain that when the relevant period of limitations commenced running must be determined based on a number of factors. For example, Plaintiffs assert the court must take into account the belief that cancer has numerous causes, whether any Plaintiff received medical or scientific advice regarding the cause of his or her cancer, whether such

advice allayed any possible suspicion of the cancer's non-organic etiology, and the purposes of discovery based accrual mechanisms for statutes of limitations as they relate to toxic torts. Plaintiffs' Memorandum of Law at 14. Defendants contend that a reasonable suspicion that an injury may have been caused by exposure to toxic or hazardous substances is sufficient to trigger a rule of limitations that is predicated on knowledge of a fact or event. Defendants' Memorandum of Law at 11. Defendants further maintain that courts have imposed on injured plaintiffs a duty to make a reasonable inquiry as to the cause of their injuries within an applicable statute of limitations period or place their claims at risk of dismissal. Defendants' Memorandum of Law at 11-12. Plaintiffs, however, argue that any attempt to discover the cause of their injuries would have been fruitless given their lack of formal education and sophistication in medical, technological and scientific fields. Plaintiffs' Memorandum of Law at 12-13.

Plaintiffs define the requisite "pertinent inquiry" to determine the correct FRCD as "what would a reasonable person in similar circumstances have known with respect to the cause of his or her cancers." Plaintiffs' Memorandum of Law at 13 (emphasis added). However, according to Plaintiffs, such "similar circumstances" include the individual Plaintiffs' states of mind, education and scientific sophistication, *id.*, and thereby injects a subjective element not present in the definition of the FRCD. As stated, the FRCD is defined as "the date the plaintiff knows (or reasonably should have known) that the personal injury . . . was caused or contributed to by the hazardous substance or pollutant or contaminant concerned." 42 U.S.C. § 9658(b)(4)(A). A plain reading of 42 U.S.C. § 9658(b)(4)(A) demonstrates that when a plaintiff knows or reasonably should know the cause of his injury is both subjective, i.e., the earlier of a plaintiff's actual knowledge, and objective based on the reasonable person

standard. Accordingly, Plaintiffs' argument that their lack of scientific sophistication and formal education has excused them from acting with due diligence to discover the cause of their injuries fails as such factors depend, contrary to the plain meaning of the FRCD, on only the subjective knowledge of each plaintiff, and excludes the alternative objective standard as provided by the FRCD.

Relevant caselaw holds that where the timeliness of a cause of action is measured by the date of discovery of the plaintiff's cause of injury, the plaintiff has a duty upon learning he has been injured to investigate for the purpose of determining the cause of the asserted injury. In *United States v. Kubrick*, 444 U.S. 111, 62 L. Ed. 2d 259, 100 S. Ct. 352 (1979), the Supreme Court held, in a Federal Tort Claims Act ("the FTCA") action, that if sufficient information exists in the community such that the plaintiff, armed with the knowledge of his injury could, upon inquiring as to the cause of such injury, have found sufficient information to commence suit, "to excuse him from promptly doing so by postponing the accrual date of his claim would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims . . .." *Kubrick, supra*, at 123. Significantly, in *Kubrick*, the Supreme Court expected its interpretation of the accrual date of a tort under the FTCA would be relied on in reaching future determinations regarding the timeliness of other claims based on similar rules. *Kubrick, supra*, at 124.

Kubrick has been interpreted as requiring a plaintiff to investigate the cause of his injury upon its discovery where the accrual of a cause of action which is based on discovery of the cause of the injury. *Fries v. Chicago v. Northwestern Transp. Co.*, 909 F.2d 1092, 1095-96 (7th Cir. 1990) ("a plaintiff must act diligently and cannot wait until the injury is actually made known to him by some unplanned incident . . ..

Rather, upon experiencing symptoms a plaintiff has a duty to investigate both the injury any suspect cause.") (emphasis added) (citing *Kubrick, supra*, at 123).

In *Kronisch v. United States*, 150 F.3d 112 (2d Cir. 1998), the Second Circuit upheld summary judgment against a plaintiff who failed to commerce an action under the FTCA more than six years had elapsed since he formed the belief that his injury was caused by his exposure to LSD in the 1950's as part of a clandestine government approved experiment. The court stated that while neither "a mere hunch, hint, suspicion or rumor of a claim" is sufficient for a cause of action to accrue, they "do give rise to a duty to inquire into the possible existence of a claim in the exercise of due diligence." *Kronisch, supra*, at 121 (emphasis added) (citing *Hobson v. Wilson*, 237 U.S. App. D.C. 219, 737 F.2d 1, 35 & n. 107) (emphasis added). The court held that had the plaintiff exercised reasonable diligence by making relevant inquiries, he would have discovered the cause of his injuries soon enough to timely commence an action. *Kronisch, supra*, at 124.

Accordingly, the court finds that Plaintiffs were obligated, upon discovering that they had cancer, to investigate to determine the cause of such injuries. The court also finds that sufficient information was available prior to 1992 such that had Plaintiffs fulfilled their duty to inquire upon discovering their injuries as to the possible existence of a claim based on their cancers, Plaintiffs would have been able to file an action more than three years prior to the filing of the instant actions.

In support of their motion, Defendants have submitted a plethora of exhibits consisting of government and media reports as well as other publicly available information pertaining to at least three citizen groups concerned with the effect of the Landfill on neighboring areas and residents,

indicating that Plaintiffs should have developed a reasonable suspicion as to the cause of their injuries prior to the end of 1991.[18] These exhibits establish that a highly publicized controversy existed within the local community over whether the Landfill posed a threat to the health and safety of those who resided or worked in the vicinity of the Landfill. The sheer volume of exhibits makes it impractical to comment on each item of information as the exhibits comprise, in total, over 10,000 pages.

After review of the exhibits, the court finds it is more than reasonable that, given the volume of information available to the public prior to 1992, Plaintiffs could be expected to reasonably suspect the cause of their cancers before the end of 1991. The vast number of media and government reports Defendants submitted in support of summary judgment were all available prior to the end of 1991. For example, a draft report entitled Emergency Task Force on Hazardous Wastes issued in 1979 indicates concerns existed regarding "the migration of leachate which may contain chlorinated

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[18] As a threshold matter, in accordance with the court's finding in its Decision and Order issued simultaneously with this Report and Recommendation regarding the motions to strike, the court has limited its consideration of the media and unauthenticated government reports, relied upon by Defendants, to the fact that such articles containing the relevant information were published rather than for the truth of the matter reported therein. *See* Decision and Order dated February 12, 1999 at 10-11 (finding that media and unauthenticated government reports submitted as exhibits to Defendants' motion for summary judgment would be considered only insofar as they helped explain the basis of Defendants' motion rather than for the truth of the matter asserted or to establish that no issue of material fact existed).

benzenes and the resulting contamination of groundwater." Defendants' Exhibit 26-4. According to that report, industrial wastes known to have been deposited into the Landfill included pine tar pitch, scrap glass and emery, waste paints and thinners, waste cutting oils, silicon, metal, waste solvents, rouge, phenol tar containing chlorinated benzenes, oil, and capacitors with PCBs. *Id.*

The First Annual Report of Hazardous Waste Disposal Sites in New York State, a joint report by the New York State Department of Environmental Conservation ("DEC") and the New York State Department of Health ("DOH") issued in June 1989, indicates that the presence of industrial wastes including waste oils, paint, thinners, pine tar pitch, cellulose, rubber, scrap metal, drums and phenol tars in the Landfill was confirmed. Defendants' Exhibit 27-17 to 27-21.

A DEC report issued in March 1980 indicates that available information demonstrated that the Landfill had received substantial quantities of waste between 1950 and 1970, some of which was of an industrial origin and that the effect of such wastes on surface and ground waters was unknown, although leachate emanating from the site indicated the potential for "serious surface water contamination" as well as possible ground water contamination and that further study of the site was warranted. Defendants' Exhibit 28-1 to 28-19.

A site inspection prepared in 1982 to "score" the Landfill for potential placement on the Federal Superfund National Priorities List concluded that the presence of toxic chemicals detected at the site posed a hazard to human health from direct contact with the site. Defendants' Exhibit 29-2 to 29-14.

In an internal office memorandum to Peter Buechi with the County of Erie Department of Environment & Planning,

Division of Environmental Control, Donald Campbell, Senior Environmental Quality Engineer with the Division of Environmental Control, reported that leachate from the Landfill was entering the stream which flows north of the Landfill and into a brush wetland west of the Landfill. Defendants' Exhibit 30-1. The DEC and DOH December 1983 Inactive Hazardous Waste Disposal Sites in New York State Annual Report refers to the fact that the Landfill was classified by the DEC as posing a "significant threat to the public health or environment - action required." Defendants' Exhibit 30-10 to 11.

Craig Fiels, son of Plaintiff Robert Fiels, prepared his own report on the Landfill in 1985 based on information obtained through FOIA requests. Defendants' Exhibit 33-2 to 33-4 and 33-7 to 33-52. Fiels concluded that "although the available data are not in total agreement as to the severity of the hazard posed by the dump, there seems to be no doubt that a variety of toxic chemicals are not only present at the site but are also migrating off-site." Defendants' Exhibit 33-43.

Warning signs were posted around the Landfill in 1986. Defendants' Exhibit 33-78. In 1987, the Landfill was formally designated as a State Superfund Site and a remedial investigation/feasibility study was prepared. Defendants' Exhibit 34-1 to 34-10.

In 1988 a Health and Safety Plan for the Pfohl Brothers Landfill was prepared for the DEC. Defendants' Exhibit 35-7 to 35-60. That report noted that major contaminants such as benzene, chlorobenzene, chrysene, pyrene, and arsenic had been detected in the Landfill. Defendants' Exhibit 35-19. Identified as potential routes of exposure were "respiratory exposure from both gaseous vapors and particulates, dermal from both particulates and vapors generated during the soil sampling activities, and adsoprtion during the ground water,

soil and sediment, leachate seep, surface water and surface waste sampling." Defendants' Exhibit 35-19.

A letter written by Thomas Cline, a plaintiff in the parallel state court actions and a founding member of the Pfohl Area Homeowners and Residents Coalition, one of the citizen action committees formed to investigate health concerns relative to the Landfill, to the editor of The Buffalo News appeared in the February 2, 1991 edition of that local newspaper of general circulation. Defendants' Exhibit 38-9. According to that letter, Mr. Cline believed that toxins and chemicals were migrating off the Landfill causing property values to decline and dissuading further construction in the vicinity of the Landfill. *Id.*

A report was released by the DOH on February 8, 1991 based on water samples collected on October 1990 from sump pumps located in the basements of six residential dwellings in the vicinity of the Landfill. Defendants' Exhibit 38-40 to 38-52. The purpose of that study was to determine "if contaminants associated with the groundwater on-site have migrated off-site to homes and in a manner that could result in human exposure." Defendants' Exhibit 38-40. It was anticipated that such data would be used for "further site characterization" and to select "remedial alternatives." *Id.* The report concluded that the levels of hazardous and toxic substances detected in the residences was not sufficient to threaten human health. Defendants' Exhibit 38-43.

A cancer incidence study issued in March 1991 by the Cancer Surveillance Program, Bureau of Cancer Epidemiology, New York State Department of Health reported "within specific anatomic sites of cancer, a significant excess of cases was observed among males for cases of prostate cancer (79 cases observed, 49 cases expected) and among females for cancers of the breast (130

cases observed, 105 cases expected) . . .. no other cancer site among males or females was found to demonstrate a significant excess or deficit of cases." Defendants Exhibit 38-105 to 38-123.

The findings contained in the DOH epidemiology study were shared with the public at a meeting held on March 25, 1991. Defendants' Exhibit 38-127. Notices of that meeting were published in The Buffalo News and The North Cheektowaga Metro Community News. Defendants' Exhibit 38-125 & 126. The minutes of that meeting indicate that those in attendance did not believe much of the information that they had received regarding whether the Landfill posed any threat to their physical safety, and that they were aware that the toxic and hazardous substances may have migrated off the site of the Landfill. Defendants' Exhibit 38-128 to 38-137.

A Responsiveness Summary for Remedial Investigation Report was issued by the DEC on April 12, 1991 as follow-up to a public meeting held on March 7, 1991 at Erie County Community College to discuss the results of the remedial investigation completed to date. Defendants' Exhibit 38-68 to 38-94. That report indicates that the issue of whether the Landfill posed any threat to the health and safety of nearby residents was a key topic of debate and inquiry.

Another epidemiology study was released by the DOH in November 1991 as follow up to the earlier March 1991 DOH cancer incidence study. The November 1991 DOH study indicates that deposits into the Landfill between 1932 and 1969 included household wastes, chemical wastes, phenol tars, waste solvents, paints, thinners, pine tar pitch, rubber and scrap metals. Defendants' Exhibit 38-192 to 38-196. The report noted that an investigation by the New York State Department of Environmental Conservation ("the DEC") began in 1983 and subsequent investigations in 1989 and

1990 detected various contaminants at the Landfill including metals (barium, iron, lead and nickel), polychlorinated biphenyls (PCBs), polychlorinated-dibenzo-p-dioxins ("dioxins") polychlorinated dibenzofurans ("furans") and other organic chemicals. *Id.* Areas of elevated radiation levels were also detected within the Landfill. *Id.* The report states that it was "conducted in response to concerns among area residents about potential increased health risks due to contamination from the Pfohl Brothers Landfill." *Id.* The report concluded that the higher than anticipated incidence of breast cancers previously observed in March 1991 by the DOH in the Landfill vicinity was attributed to personal risk factors, Defendants Exhibit 38-194, and no statistically significant "clustering" was observed as to previously reported cases of prostate cancer or newly diagnosed leukemia, lymphoma or female lung cancers. Defendants' Exhibit 38-196.

At a public hearing held on December 11, 1991, before DEC Hearing Office Peter J. Buechi, Regional Engineer for Solid and Hazardous Waste, Ms. Weiss, Chairperson of the Pfohl Brothers Landfill Cleanup Committee ("the PBLCC"), a citizen action group whose intended purpose was to monitor the cleanup of the Landfill, spoke. Defendants' Exhibit 38-210 to 38-251. Ms. Weiss declared that as the DEC had acknowledged to the PBLCC that "the actual volumes of materials and areas to be excavated are not clearly defined . . . . [the PBLCC] has the perception that the depth of contamination is still unknown." Defendants' Exhibit 38-216. Ms. Weiss then stated that "people living near or adjacent to this site should be temporarily or permanently relocated." *Id.*

Although Plaintiffs base their failure to determine the cause of their cancers earlier than December 1994 partly on their lack of formal education, no Plaintiff has maintained that he or she is illiterate or otherwise unable to understand such

reports. To the contrary, many of the Plaintiffs admitted in response to Defendants' interrogatories that they first learned through media reports that exposure to hazardous or toxic substances could cause cancer. *See* Defendants' Exhibits 1-9, 2-12, 3-15, 4-14, 5-15, 7-12, 9-14, 10-26, 11-14, 13-13, 14-12, 15-17, 16-12 and 20-10. For example, in response to Defendants' interrogatories, Plaintiff Michael Lamancuso indicated that he first learned of a causal connection between exposure to hazardous and toxic substances and cancer in high school, Defendants' Exhibit 13-13, while Defendant Norman Wagner stated that he first acquired such knowledge when he attended asbestos removal classes ten years earlier. Defendants' Exhibit 19-14. Plaintiff Harry Basinski stated in response to Defendants' Interrogatory No. 10 that it was through media coverage of the Love Canal case, another major environmental case in Western New York, that he first learned that exposure to hazardous or toxic substances might cause cancer. Defendants' Exhibit 2-12.

The fact that other similar lawsuits had been commenced in the Western District of New York also should have alerted Plaintiffs to the cause of their injuries. Specifically, Plaintiffs admitted familiarity with the Love Canal case that received extensive coverage in the national media and was one of the major justifications for the SARA legislation which enacted the FRCD in 1986. Further, a legal action to recover injuries to real property brought by owners of property located near the Landfill allegedly caused by latent effects of exposure to substances in the Landfill was held time-barred under § 214-c(2) as more than three years before commencing such suit the plaintiffs had applied for reductions of their property tax assessments based on exposure to the Landfill. *Pfohl v. Amax, Inc.*, 222 A.D.2d 1068, 635 N.Y.S.2d 880, 881 (App. Div. 4th Dep't. 1995). Thomas Cline testified at his deposition on September 3, 1997 that he and Plaintiff Robert Fiels has previously contacted another attorney, Richard

Lippes, Esq. in 1990 to investigate the possibility of commencing legal action similar to their pending actions. Defendants' Exhibit 39-2 and 39-9.

Plaintiffs maintain that despite the existence of publicly available information indicating that the Landfill may pose a threat to residents and workers in the vicinity, numerous other publicly available media, medical and scientific reports allayed any such suspicions they may have had. Plaintiffs' Memorandum of Law at 2425. At the very least, Plaintiffs maintain that the reassurances created by the reports issued by the New York State Departments of Environmental Conservation and Health, state agencies directly concerned with the potential damage to the environment and public health posed by the Landfill, establish factual issues going to Plaintiffs' discovery of cause of their injuries as Plaintiffs were entitled to rely on such reports. Plaintiffs' Memorandum of Law at 25.

Despite the existence of such "reassuring reports" there is, however, considerable evidence that the matter of whether the Landfill posed a threat to their health remained unresolved. *See, e.g.*, Plaintiffs' Exhibits 34-47 to 34-53; 34-54 to 34-73; 34-114 to 34-120 and 34-185 to 34-195. It is also significant that no Plaintiff has pointed to any evidence indicating that he or she relied on these reports. To the contrary, Plaintiffs admit that they never asked any physician what caused their cancers nor mentioned their proximity to the Landfill. See Defendants' Exhibits 49-68). Further, no reasonable juror could infer anything from the statements made by Ms. Weiss at the public hearing before DEC Hearing Officer Buechi on December 11, 1991, other than that relocation of persons who resided in the vicinity of the Landfill was requested based on a belief that continued exposure to toxins from the Landfill posed a serious risk to their health.

Given the abundance of media coverage dedicated to the Landfill prior to 1992 along with Plaintiffs' admissions in response to interrogatories that they acquired the requisite knowledge to develop a reasonable suspicion as to the cause of their cancers through media reports, no reasonable trier of fact could find that Plaintiffs, had they been reasonably diligent in inquiring as to the cause of their cancers upon being diagnosed, would not have discovered sufficient information to develop a reasonable suspicion as to the cause of such injuries prior to the end of 1991. Furthermore, as discussed below, had Plaintiffs exercised their duty to inquire as to the cause of their cancers, their efforts would not have been fruitless as sufficient scientific, technological and medical information existed not later than by the end of 1991 to permit Plaintiffs to discover the cause of their injuries.

d. Plaintiffs Have Failed to Establish that It Was Not Possible, Had They Exercised Due Diligence, to Discover the Cause of Their Cancers Prior to 1992

Plaintiffs maintain that they could not be required to further investigate a mere suspicion as to the cause of their cancers where such investigation would have been fruitless. Defendants' Memorandum of Law at 17. Defendants point out in their reply, that as after 1991 there were no new government studies, releases of previously undisclosed information, nor any medical or scientific breakthroughs on which Plaintiffs rely as having permitted them to discover the cause of their cancers, Plaintiffs have failed to establish the existence of a material issue of fact that such cause could not have been determined prior to the end of 1991. Defendants' Reply Memorandum of Law at 10-11. Plaintiffs have not responded to this argument.

The timeliness of Plaintiffs' claims under § 214-c(4), as preempted by § 9658, is based on an objective determination as to when sufficient information was available such that Plaintiffs, with the knowledge of their cancers and the fact that exposure to hazardous and toxic substances can cause cancer, and acting with a reasonable amount of diligence, could have discovered the cause of their cancers, at least to the same degree of knowledge they assertedly possessed as of the time they finally chose to file. By its own terms, § 214-c(4) requires that "the plaintiff or claimant shall be required to allege and prove that technical, scientific or medical knowledge and information sufficient to ascertain the cause of his injury had not been discovered, identified or determined prior to the expiration of the period within which the action or claim would have been authorized . . .." § 214-c(4). Section 214-c(4), however, does not require that the allegedly injured party acquire detailed scientific proof of the source of the injury before commencing suit. *Mancuso v. Consolidated Edison Company of New York, Inc.*, 905 F. Supp. 1251, 1262 (S.D.N.Y. 1995). Nor may an injured party delay triggering the limitations period by refusing to conduct scientific tests to determine the cause of the alleged injury. *Mancuso, supra*, at 1262. Instead, the additional limitations period provided by § 214-c(4) is intended to benefit only those injured parties who could not, despite the exercise of reasonable diligence upon diagnosis, have discovered the cause of their injuries earlier because the scientific, medical or technological information needed to make such determination was not available. *Mancuso, supra*, at 1261.

As the court has found that § 9658 preempts § 214-c(4) only to override, in toxic tort cases to which it is applicable, the temporal restriction as to when an action may be timely commenced based on the discovery of the cause of the injury, § 9658 has not eliminated the pleading and proof requirement

under § 214-c(4) regarding a plaintiff's objections concerning the state of technology, science and medicine. Accordingly, to avoid summary judgment, Plaintiffs must demonstrate there exists a genuine issue of disputed fact that the state of science, technology and medicine one year prior to the filing of the instant actions rendered the cause of their cancers not reasonably discoverable.

Plaintiffs maintain that they were not required to investigate the cause of their cancers before December 1994 when the preliminary results of the Pfohl environmental health study conducted by Plaintiffs' experts, Drs. Rigle and Sawyer ("the Rigle-Sawyer Report") were first shared at a meeting at which many of the Plaintiffs as well as Plaintiffs' legal counsel were present. Plaintiffs' Memorandum of Law at 21 (citing Affidavit of Laura J. Van Pelt, Esq., in Support of Plaintiffs' Response to Liaison Group Defendants' Consolidated Motion for Partial Summary Judgment filed December 24, 1997 (Docket Item Number 414), at PP 10-26. According to Plaintiffs, the idea that the cause of their cancers may be attribute to the Landfill "had not even crossed their minds prior to 1994." *Id.* Defendants argue that despite Plaintiffs' claim that it was reasonable for them not to investigate the cause of their cancers prior to December 1994 when their attorneys and experts informed them of the cause, Plaintiffs have failed to demonstrate why they could not have obtained such information at an earlier date. Defendants' Reply Memorandum of Law at 10.[19]

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[19] Although both parties refer to the Rigle-Sawyer Report in support of their arguments on the summary judgment motion, the Rigle-Sawyer Report has not been made part of the record. However, the court notes that drafts of the Rigle-Sawyer Report were submitted to the court in connection with an earlier motion for a protective order. To ensure that the record is complete for further review, the court has

(Footnote continued on next page)

Significantly, Plaintiffs have submitted no evidence or any explanation as required under § 214-c(4) why it was not possible to obtain a "scientific" opinion similar to the one contained in the Rigle-Sawyer Report on which they rely in support of their contention that the FRCD occurred no earlier than December 1994, substantially prior to that date. The March and November 1991 DOH cancer incidence reports as well as the Rigle-Sawyer Report all compare the incidence of specific types of cancer diagnosed in persons who lived or worked near the Landfill with the expected incidence of similar types of cancer occurring within the general population. It is undisputed that the conclusions reached by the DOH reports issued in March and November 1991 and the Rigle-Sawyer Report differ as to whether any elevation in the incidence of any particular type of cancers occurring among those who lived or worked near the Landfill which could be attributed to the hazardous and toxic substances known to have been deposited into the Landfill. A review of the February 1991 report indicates that the DOH used different methods than Drs. Rigle and Sawyer to obtain specimens for the chemical analysis contained in those reports. Plaintiffs do not, however, contend that the findings contained in the Rigle-Sawyer Report are based on scientific testing techniques or statistical analysis that could not have been performed earlier than 1994. Nor do Plaintiffs deny that the Rigle-Sawyer Report does anything other than draw correlations between the incidence of reported cancers in the vicinity of the Landfill and the type of hazardous and toxic substances detected in the Landfill. In any event, if the Rigle-Sawyer Report is based on technical, scientific or medical knowledge developed after the dates of the earlier DOH

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directed that copies of those draft reports be filed as court exhibits.

study, Plaintiffs have not, as required by Fed.R.Civ.P. 56(e), demonstrated it.[20]

Plaintiffs argue that granting summary judgment would be unfair and defeat the remedial purposes of § 9658. Plaintiffs' Memorandum of Law at 14. The purpose of any statute of limitations is to fairly balance a claimant's right to access to the courts with a defendant's interest in repose. *Aslanidis v. United States Lines, Inc.*, 7 F.3d 1067, 1074 (2d Cir.1993) ("Statutes of limitations are designed to ensure fairness to defendants and to prevent surprises brought about by the attempt to breathe life into causes that have lain dormant for so long that proof, witnesses and memories all, have disappeared."). As such, there is nothing unfair in imposing the sanction of dismissal even in a toxic tort case based on latent harm where a plaintiff has been laggard in pursuing his claim. No so-called "discovery rule" for accrual of toxic tort action requires or permits a prospective plaintiff to develop sufficient evidence of causality before accrual may occur. *See e.g., Blanco, supra*, (applying § 214-c(2) based on symptoms of carpal tunnel syndrome). For a plaintiff to argue, as Plaintiffs apparently do, Plaintiffs' Memorandum of Law at 14-18, that under § 9658 a toxic tort statute of limitations does not accrue until a plaintiff has sufficient evidence to meet his burden of proof at trial, confuses the notion of accrual for statute of limitations purposes with the requirements of proof at trial. If Plaintiffs were correct, accrual might be extended indefinitely as a plaintiff would argue he was entitled to await scientific or medical certainty

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[20] For example, according to the Rigle-Sawyer Report, the DOH study "provided less than optimal scientific data" because "standard and customary epidemiological methods were not exercised." Rigle-Sawyer Draft Report Section A, p. 2.

as to the issue of causation before filing a claim. The FRCD as enacted by § 9658 permits no such refuge; rather, it places a fair burden on a plaintiff to diligently investigate a possible claim. Section 214-c(4) permits a plaintiff to delay accrual, but only if the plaintiff, at his risk, is able to show that he could not, consistent with the status of scientific, technological or medical knowledge, have reasonably known he could do so earlier. Plaintiffs have, for the reasons discussed, failed to make such a showing here.

Accordingly, Plaintiffs' failure to support their contention that it would have been fruitless to investigate the cause of their cancers earlier as such determination was not possible based on the state of technology, science and medicine is fatal to their claims on the instant summary judgment motion.[21]

3. Constitutionality of 42 U.S.C. § 9658

Defendants have also incorporated by reference to their Memorandum of Law submitted in support of their previous

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[21] The court notes that none of the complaints filed in this action, including both original and amended complaints as well as the more recently filed complaint in the *Minier* action allege, as required under § 214-c(4), that the Plaintiffs were prevented from discovering the cause of the cancers earlier because the technical, scientific or medical knowledge or information required to ascertain such cause had yet to be discovered, identified or determined prior to the time which would have permitted the instant claims to be timely filed under § 214-c(2). However, Defendants have not moved to dismiss under Fed.R.Civ.P. 12(b)(6) for failure to state a claim, and, as such, the court's finding that these claims are time-barred is not based on such failure.

motion for summary judgment the same challenge to the constitutionality of the FRCD arguing it represents an exercise of congressional legislative power beyond the limits of the Commerce Clause and also violates the Tenth Amendment. Defendants' Memorandum of Law, at 8, citing Defendants' *Pfohl I* Memorandum of Law at 27. Plaintiffs assert that the FRCD was validly enacted pursuant to Congress' authority under the Commerce Clause and does not invade the sovereignty of the states. Plaintiffs' Memorandum of Law at 3-6.

The only new argument advanced by Defendants in support of their challenge to § 9658's constitutionality is an assertion that the Second Circuit recently held in *ABB Industrial Systems, Inc. v. Prime Technology, Inc.*, 120 F.3d 351 (2d Cir. 1997) that § 9658 violates the Tenth Amendment. Defendants' Memorandum of Law at 8. In support of their argument, Defendants specifically refer to a footnote in that case in which the court noted that § 9658 "appears to purport to change state law, and is therefore of questionable constitutionality" under *Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997) and *New York v. United States*, 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992). Defendants' *Pfohl I* Memorandum of Law at 8 (citing *ABB Industrial Systems, Inc., supra*, at 360 n. 5). Defendants thus maintain that by questioning the constitutionality of the FRCD, the Second Circuit also found it unconstitutional. Defendants, in reply to Plaintiffs' response, cite *Seneca Meadows Inc. v. ECI Liquidating, Inc.*, 983 F. Supp. 360 (W.D.N.Y. 1997), decided after the instant motion was filed, in further support of their motion. Liaison Group Defendants' Reply Memorandum of Law in Support of Consolidated Motion for Partial Summary Judgment filed January 20, 1998 (Docket Item Number 442) ("Defendants' Reply Memorandum of Law") at 1 n. 1.

However, a plain reading of *ABB Industrial Systems, Inc., supra*, reveals that, contrary to Defendants' assertion, the Second Circuit did not determine that § 9658 was unconstitutional and, in fact, stated "we will not address the issue of the constitutionality of section 9658 today." *ABB Industrial Systems, Inc., supra*, at 360 n. 5. Defendants' assertion that by questioning the constitutionality of § 9658 but declining to address that issue the Second Circuit held § 9658 is unconstitutional is thus a non sequitur. Nor does *Seneca Meadows, supra*, support Defendants' argument as there, Judge Larimer, noting that the Second Circuit had questioned the constitutionality of § 9658, stated that as that question also was not before the district court, it was unnecessary to address it. *Seneca Meadows, supra*, at 363 n. 1.

Further, in accordance with *Pfohl I*, the court finds that § 9658 does not violate either the commerce clause or the Tenth Amendment and, as such, is constitutional. *Pfohl I* at 539-46.

4. Derivative Loss of Consortium Claims

Defendants maintain that Plaintiffs' loss of consortium claims[22] must be dismissed if the underlying action is

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[22] The court notes that loss of consortium claims were originally asserted by Ellen Basinski as spouse of Harry Basinski, Patricia Batt as spouse of Kevin Batt, Morley Davis as spouse of Geraldine Davies, Delores Fiels as spouse of Robert Fiels, Annabel Foisset as spouse of Leo Foisset, Leo Foisset as spouse of Annabel Foisset, Carl Forman as spouse of Nancy Forman, Raymond Freier as spouse of Rose Freier, Rose Freier as spouse of Raymond Freier, Marlene Lamancuso as spouse of Michael Lamancuso, Marie Manolis as spouse of Louis Manolis, Donald McKowan as spouse of

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dismissed. Defendants' Memorandum of Law, at 64. Defendants further maintain that Marlene Lamancuso's loss of consortium claim which is derivative of her husband Michael Lamancuso's claims should be dismissed in light of *Consorti v. Owens-Corning Fiberglas Corp.*, 86 N.Y.2d 449, 657 N.E.2d 1301, 634 N.Y.S.2d 18 (N.Y. 1995) where the court held that no action for loss of consortium may be maintained where the relevant injury to the marital partner occurred prior to marriage. Defendants' Memorandum of Law at 64.

Plaintiffs maintain that as summary judgment should not be granted with regard to the underlying claims, the court should also refrain from granting summary judgment on the instant derivative loss of consortium claims. Plaintiffs' Memorandum of Law at 45. Plaintiffs have, however, conceded that Marlene Lamancuso's loss of consortium claim should be dismissed. Plaintiffs' Memorandum of Law at 45.

In New York, a loss of consortium claim is derivative in nature as it belongs to the spouse of the party on whose behalf a personal injury or survival action is maintained. *Liff v. Schildkrout*, 49 N.Y.2d 622, 404 N.E.2d 1288, 1291, 427 N.Y.S.2d 746 (N.Y. 1980). Additionally, a spouse may recover on a loss of consortium claim only for the period

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Donna McKowan, Flora Mueller as spouse of Franklin Mueller, and Patricia Wagner as spouse of Norman Wagner. Delores Fiels and Patricia Wagner have, however, discontinued their claims. See Decision and Order, dated August 31, 1998 (Docket Item Number 504) at 27-28. Additionally, Ellen Basinski has died since commencing her action and a representative of her estate has yet to be substituted.

between injury to and the spouse's death. *Liff, supra*, 404 N.E.2d at 1291.

As the court is recommending dismissal of all the instant actions except Harry Basinski's personal injury claim based on his prostate cancer and Rose Freier's survival action based on her liver and throat cancers, all the loss of consortium claims asserted which are derivative of the claims of Kevin Batt, Geraldine Davies, Annabel Foisset, Leo Foisset, Nancy Forman, Raymond Freier, Michael Lamancuso, Louis Manolis, Donna McKowan and Franklin Mueller must also be DISMISSED. The loss of consortium claims continue as to Harry Basinski, provided an appropriate person in substituted for Ellen Basinski who is now deceased, and Rose Freier.

Further, should the district court disagree that the underlying claims from which the loss of consortium claims are derived should be dismissed as untimely, Marlene Lamancuso's loss of consortium claim should be dismissed in accordance with Plaintiffs' concession.

5. Punitive Damages

As stated, the instant Plaintiffs have filed personal injury, survival and wrongful death actions, as well as claims for loss of consortium. Defendants contend that under New York law, punitive damages are recoverable only if the underlying cause of action supports such an award. Specifically, Defendants argue that if the underlying survival and wrongful death actions are time-barred, no underlying cause of action remains to support an award of punitive damages. Defendants' Memorandum of Law, at 65 (citing Defendants' *Pfohl I* Memorandum of Law at 46-49). Defendants also maintain that the Plaintiffs' punitive damages claims are legally insufficient as punitive damages are not available

unless the defendant acted with wrongful intent and with a degree of recklessness similar to criminality. *Id., citing Astor* Complaint (Docket Item Number 1, 95-CV-247E(F)) at ¶ 71. Defendants therefore urge that Plaintiffs' allegations that Defendants' actions "were grossly, recklessly and wantonly negligent and were done with utter disregard for the rights and safety of plaintiffs and other persons similarly situated" should be dismissed. *Id.*

Punitive damages may be awarded in tort actions brought under New York law "where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant but to deter him, as well as others who might be so prompted, from indulging in similar conduct in the future." *Walker v. Sheldon*, 10 N.Y.2d 401, 179 N.E.2d 497, 498, 223 N.Y.S.2d 488 (N.Y. 1961). In 1982, the New York survival statutes, N.Y. Est. Powers & Trusts Law §§ 5-4.3(b) and 11-3.2(b)(McKinney 1997), were amended to permit punitive damages in survival and wrongful death actions as to any decedent whose death occurred after August 31, 1982. *See* 1982 N.Y. Laws 100, §§ 1 and 2. However, no separate cause of action for punitive damages exists under New York law and, accordingly, punitive damages may be recovered only if such damages are available upon establishing the underlying claim. *Porter v. Allstate Insurance Co.*, 184 A.D.2d 685, 585 N.Y.S.2d 465, 466 (App. Div. 2d Dep't. 1992).

In the instant case, the court has determined that all of the actions are untimely except for the claims pertaining to Harry Basinski's prostate cancer and Rose Freier's liver and throat cancer. Discussion, *supra*, at 21-22. Additionally, the loss of consortium claims derivative of Harry Basinski's and Rose Freier's claims also timely. *Id.* Accordingly, the claims for

punitive damages may proceed only as to those claims and the balance should be dismissed.[23]

CONCLUSION

Based on the foregoing, Defendants' motion for partial summary judgment should be DENIED as to Harry Basinski (based on his prostate cancer), Ellen Basinski (based on her loss of consortium claim asserted with respect to Harry Basinski's personal injury claim limited to his prostate cancer), Raymond Freier (based on his loss of consortium claim asserted with respect to Rose Freier's personal injury claims limited to her liver and throat cancers) and Rose Freier (based on her personal injury and failure to warn claims limited to her liver and throat cancers) and GRANTED as to Grace Astor, Kevin Batt, Patricia Batt, Geraldine Davies, Morley Davies, Robert Fiels, Annabel Foisset, Leo Foisset, Carl Forman, Nancy Forman, Raymond Freier (as to his personal injury and failure to warn claims), Rose Freier (as to her loss of consortium claim relative to Raymond Freier's personal injury claim), Tab Fuqua, Helen Hancock, Marlene Lamancuso, Michael Lamancuso, Louis Manolis, Marie Manolis, Donald McKowan, Donna McKowan, Charlotte Mucha, Flora Mueller, Franklin Mueller, William Nielsen, Norman Wagner and Mary Ylmar.

Pursuant to 28 U.S.C. § 636(b)(1), it is hereby

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[23] The court notes that although Ellen Basinski whose loss of consortium claim was derivative of Harry Basinski's claims has died since her action was commenced, no motion has been made to substitute a representative of her estate to continue her suit.

ORDERED that this Report and Recommendation be filed with the Clerk of the Court.

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of the Court within ten (10) days of service of this Report and Recommendation in accordance with the above statute, Rules 72(b), 6(a) and 6(e) of the Federal Rules of Civil Procedure and Local Rule 72.3.

Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the District Court's Order. *Thomas v. Arn*, 474 U.S. 140, 88 L. Ed. 2d 435, 106 S. Ct. 466 (1985); *Small v. Secretary of Health and Human Services*, 892 F.2d 15 (2d Cir. 1989); *Wesolek v. Canadair Limited*, 838 F.2d 55 (2d Cir. 1988).

Let the Clerk send a copy of this Report and Recommendation to the attorneys for the Plaintiffs and the Defendants.

SO ORDERED.

DATED: February 12, 1999

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

IN RE: PFOHL BROTHERS LANDFILL LITIGATION

MASTER FILE: 95-CV-0020A

THIS DOCUMENT RELATES TO:

FREIER, et al. v. Westinghouse, et al.	(95-CV-20)
FREIER, et al. v. Litton Systems, Inc.	(97-CV-923)
ASTOR, et al. v. Westinghouse, et al.	(95-CV-247)
BATT, et al. v. Westinghouse, et al.	(95-CV-107)
DAVIES, et al. v. Westinghouse, et al.	(95-CV-444)
FIELS, et al. v. Westinghouse, et al.	(96-CV-395)
ANTHONY, et al. v. Westinghouse, et al.	(97-CV-19)
MUCHA, et al. v. Westinghouse, et al.	(99-CV-219)

FILED UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK ON MAY 18, 2000

AMENDED FINAL JUDGMENT

THIS MATTER is before the Court upon the Final Judgment entered by this Court on January 5, 2000; the Stipulation For Entry of Judgment Based Upon The Court's Rulings Regarding The Defendants' Statute of Limitations Defense filed by the Plaintiffs and Defendants on December 27, 1999; the Addendum to the Stipulation For Entry of Judgment Based Upon The Court's Rulings Regarding The Defendants' Statute of Limitations Defense filed by the Plaintiffs and Defendants on May ___, 2000; the Order of the Court dated September 22, 1999, and all prior pleadings and proceedings had herein. The Court has carefully reviewed

the entire Court file and is otherwise fully advised in the premises.

At the outset, the Court notes that the effect of this Amended Final Judgment is two-fold: (1) entry of final judgment and dismissal of all claims of all parties in the action captioned Anthony, *et al. v. Westinghouse, et al.* (97-CV-19) ("Anthony action") pursuant to Rule 58 of the Federal Rules of Civil Procedure; and (2) entry of final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure as to the claims of all plaintiffs in the remaining actions (other than the seven claims which have been severed) and certification of those claims for immediate review on the grounds that the judgment is final and there is no just reason for delay of entry of judgment and review.

With regard to the Anthony action, by virtue of the prior Orders and Stipulations set forth above, final judgment pursuant to Rule 58 is appropriate as to all claims of all parties. With regard to the remainder of the actions subject to this Amended Final Judgment, the Final Judgment entered January 5, 2000 may have affected more than one but fewer than all of the claims or parties involved in those actions (Freier, Astor, Batt, Davies, Fiels and Mucha). Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure and upon review of the matters raised in these proceedings and the law with respect thereto, this Court directs that final judgment enter as to the claims and parties enumerated below and finds that there is no just reason for delay of entry of Final Judgment as to the claims and/or parties identified herein. Any claims in the Freier, Astor, Batt, Davies, Fiels and Mucha actions that are not subject to dismissal have been severed pursuant to Rule 21 and are proceeding in a separate action (*Minier et al v. Westinghouse et al*, Civ. No. 98-CV-560).

This Amended Final Judgment is final as to all parties to the Anthony action. This Amended Final Judgment is also final as to the fifty-three (53) plaintiffs in the Freier, Astor, Batt, Davies, Fiels and Mucha actions whose claims are dismissed herein pursuant to Rule 54(b). All claims among defendants/third party defendants for contribution, in the form of cross claims and third party claims, are rendered moot by virtue of the dismissals of plaintiffs' claims. No other claims are asserted by any party in any action.

If each plaintiff had sued in a separate complaint, each complaint would be subject to a final judgment pursuant to FRCP 58. Any question as to the "finality" of this judgment arises only because the plaintiffs have joined their claims in a series of Complaints. These claims are related only insofar as they all allege that each plaintiff was injured as a result of defendants' acts or omissions with regard to the Pfohl Brothers landfill. The claims of each plaintiff are distinct from one another, and each could have been filed as a separate lawsuit. Thus, this judgment meets the standard set by the United States Supreme Court in *Curtiss-Wright Corp. General Electric Co.*, 446 U.S. 1, 7 (1980) and *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1956) both of which recognized that a judgment is final where it is "an ultimate disposition of an individual claim entered in the course of a multiple claims action."

In addition, final judgment in the Anthony action pursuant to R. 58 dismisses all claims of all parties to that action. Thus, it is a final order and is appealable as of right by the parties. The dismissals in the Anthony action and the dismissals in the remaining actions all arise out of the same facts and circumstances and rely on application of the same law. Thus, certification of these claims as final and appealable under Rule 54(b) will allow for a more comprehensive review by the Second Circuit, rather than the

piecemeal review that would result if only the Anthony action were appealed at this time.

But for the claims of the seven plaintiffs that are not dismissed by this Amended Final Judgment and whose claims have been severed, this judgment disposes of all claims of all parties to the above enumerated actions. The severed claims are not affected by this Final Judgment because those claims raise issues that are separate and distinct from the dismissed claims.

The Court finds that there is no just reason to delay entry of this final judgment, as it advances the interests of fairness, justice and judicial economy for the Court and all litigants. Further, this Court finds that the interests of efficient judicial administration are well served by entry of final judgment pursuant to Rule 54(b). All of the dismissed claims herein have been found to be untimely under the applicable statute of limitations. The small number of severed and surviving claims are those that survived defendants' statute of limitations challenge. Thus, the severed/surviving claims present issues separate and distinct from the claims subject to this final judgment.

This Court also finds that certification will not result in piecemeal or duplicative appeals. Even if the surviving claims result in later appeals, such appeals will involve distinct issues of fact and law, and will not involve the same timeliness issues presented by the instant claims. Nor will resolution of the surviving claims conceivably affect an appellate decision on the dismissed claims. Moreover, since the Anthony action is subject to appeal as of right, certification of the remaining cases will allow for them to be considered in conjunction with Anthony so that the appellate court can consider all claims raising timeliness issues at one time and thereby avoid piecemeal or duplicative appeals.

The Court further finds that it would be an undue burden to this Court to proceed through the litigation process with regard to the seven surviving claims, only to duplicate that process in the event that the dismissed claims are reinstated upon appeal. A determination at this time of the number of viable claims will guide the scope of this litigation and will allow the Court to proceed through later stages of this proceeding in an organized and orderly fashion. In addition, it is unlikely that the parties can meaningfully explore settlement until the number and scope of the claims involved in this litigation is determined.

Moreover, certification under Rule 54(b) also advances the interests of the litigants. The court notes that both plaintiffs and defendants support this certification. Under the facts and circumstances of this case, it would be unjust to the 53 dismissed plaintiffs in the Freier, Astor, Batt, Davis, Fiels and Mucha actions to delay an appeal of those dismissals until the claims of the few remaining plaintiffs are reduced to final judgment, which could delay review for years.

Any delay of appellate review is likewise unjust to the defendants, all of whom are expending significant sums to defend these cases. The defendants will be prejudiced if they must proceed through the entire litigation process as to the severed claims, including protracted discovery and trial, only to face the risk of having to repeat the process should these dismissed claims later be deemed timely by an appellate court.

Accordingly, this Court finds that the criteria for certification under FRCP 54(b) have been met herein and that there exists no just reason for delay.

By prior Order of this Court dated October 28, 1998, the claims asserted by the estate representatives and spouses

of the following decedents were dismissed with leave to refile:

ALFRED MUCHA	(ASTOR ACTION)
CHARLOTTE MUCHA	(DERIVATIVE CLAIM- ASTOR ACTION)
EVO ASTOR	(DAVIES ACTION)
GRACE ASTOR	(DERIVATIVE CLAIM - DAVIES ACTION)
CHARLES BATT	(BATT ACTION)
ROSE BATT	(BATT ACTION)
LORRAINE BRZEZICKI	(ASTOR ACTION)
GRETCHEN HEANEY	(DAVIES ACTION)
JOSEPH INZINNA	(FREIER ACTION)
ROBERT MARTZOLF	(ASTOR ACTION)
MARIE MARTZOLF	(DERIVATIVE CLAIM - ASTOR ACTION)
VINCENT MONGIOVI	(BATT ACTION)
JACQUELINE MONGIOVI	(DERIVATIVE CLAIM - BATT ACTION)
MARY STURM	(ASTOR ACTION)

The above listed claims were refiled in a new complaint entitled *Mucha, et al v. Westinghouse, et al* (Civ. No. 99- CV- 219) and these refiled claims are encompassed by this Amended Final Judgment.

Accordingly, after due consideration, it is

ADJUDGED as follows:

1. The Stipulation For Entry of Judgment Based Upon The Court's Rulings Regarding The Defendants' Statute of Limitations Defense and Addendum thereto, filed herein by the Plaintiffs and the Defendants, is hereby approved, adopted and ratified by the Court;

2. Final Judgment be and the same is hereby entered pursuant to Rule 58 of the Federal Rules of Civil Procedure in favor of the defendants against all claims asserted by or on behalf of all plaintiffs and/or their estates in the Anthony action (more specifically, DIANE ANTHONY, LEOCADIA JASINSKI, GEORGE SCHERRER, SR., MARIE SCHERRER, LEO OTT, VICTORIA SZYPLMAN, ROBERT ZAWATSKI, VERONICA ZAWATSKI, MICHAEL LAMANCUSO, MARLENE LAMANCUSO), and the Anthony complaint is hereby dismissed.

3. The cross claims asserted by defendants and third party defendants to the Anthony action are dismissed as moot by virtue of the dismissal of plaintiffs' complaint in its entirety.

4. The third party complaint in the Anthony action, asserting claims for contribution, is dismissed as moot by virtue of the dismissal of plaintiffs' complaint in its entirety.

5. Final Judgment be and the same is hereby entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, in favor of defendants dismissing all claims asserted by or on behalf of the following persons and/or their estates in the Freier, Astor, Batt, Davies, Fiels, and Mucha actions:

FREIER ACTIONS (Civ. No. 95-CV-20 AND 97-CV-923)

RAYMOND FREIER
ROSE FREIER
TAB FUQUA
CHARLOTTE MUCHA
LEO PHILLIPS
DOROTHY PHILLIPS
ROBERT FARINO
MARY JANE FARINO

ASTOR ACTION (Civ. No. 95-CV-247)

GRACE ASTOR
LOUIS MANOLIS, SR.
MARIE MANOLIS
MARY YLMAR

BATT ACTION (Civ. No. 95-CV-107)

WILLIAM NIELSON
LEO FOISSET
HELEN HANCOCK
FRANKLIN MUELLER
FLORA MUELLER
GEORGE PAGELS
GLORIA PAGELS
HENRY KUCZKA
SHIRLEY KUCZKA
STEPHEN GRANDILLO

DAVIES ACTION (Civ. No. 95-CV-444)

KEVIN C. BATT
PATRICIA BATT
ANNABEL FOISSET
LEO FOISSET
DONNA McKOWAN
DONALD McKOWAN
NORMAN WAGNER
PATRICIA WAGNER

FIELS ACTION (Civ. No. 96-CV-395)

ROBERT FIELS
DOLORES FIELS
ANTHONY MARINO
IRENE MARINO
NANCY FORMAN
CARL FORMAN

JOSEPH WIEDENBECK
ISABELLE WIEDENBECK

MUCHA ACTION (Civ. No. 99-CV-219)

ALFRED MUCHA
CHARLOTTE MUCHA
EVO ASTOR
GRACE ASTOR
CHARLES BATT
ROSE BATT
LORRAINE BRZEZICKI
GRETCHEN HEANEY
LAWRENCE HEANEY
JOSEPH INZINNA
ROBERT MARTZOLF
MARIE MARTZOLF
VINCENT MONGIOVI
JACQUELINE MONGIOVI
MARY STURM

6. Final Judgment is also entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure in favor of defendants dismissing the identified claims asserted by or on behalf of the following persons and/or their estates,:

- the throat cancer claim on behalf of Harry Basinski in the Astor action;

- the loss of consortium claim on behalf of Ellen Basinski in the Astor action related to the throat cancer claim of Harry Basinski;

- the lung cancer claim on behalf of Rose Freier in the Davies action;

- the loss of consortium claim on behalf of Raymond Freier in the Davies action related to the lung cancer claim of Rose Freier;

- the breast cancer claim on behalf of Geraldine Davies in the Davies action;

- the loss of consortium claim on behalf of Morley Davies in the Davies action related to the breast cancer claim of Geraldine Davies;

- the wrongful death claim on behalf of Nelson Hirsch in the Fiels action.

7. The Clerk is hereby directed to enter judgment accordingly.

ADJUDGED in Chambers, Buffalo, New York on this 15th day of May, 2000.

s/Richard J. Arcara
Honorable Richard J. Arcara
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT•
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE, CLERK

At a stated term of the United States Court of Appeals for the Second, held at the United States Courthouse, Foley Square, in the City of New York, on the 8th day of October two thousand two.

Dockets: 00-7724(L), 00-7718 (XAP) **FILED: Oct. 8, 2002**
Raymond Freier, et al,

Plaintiffs-Appellants-Cross-Appellees,

v.

Westinghouse Electric, et al,

Defendants-Appellees-Cross-Appellants.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee's Westinghouse Electric, et al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE,
Clerk

By: /s/ Arthur Heller
Arthur M. Heller,
Administrative Attorney

42 U.S.C. § 9658. Actions under State law for damages from exposure to hazardous substances

(a) State statutes of limitations for hazardous substance cases

(1) Exception to State statutes

In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

(2) State law generally applicable

Except as provided in paragraph (1), the statute of limitations established under State law shall apply in all actions brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility.

(3) Actions under section 9607

Nothing in this section shall apply with respect to any cause of action brought under section 9607 of this title.

(b) Definitions

As used in this section--

(1) Subchapter 1 terms

The terms used in this section shall have the same meaning as when used in subchapter I of this chapter.

(2) Applicable limitations period

The term "applicable limitations period" means the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this section may be brought.

(3) Commencement Date

The term "commencement date" means the date specified in a statute of limitations s the beginning of the applicable limitations period.

(4) Federally required commencement date

(A) In General

Except as provided in subparagraph (B), the term "federally required commencement date" means the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.

(B) Special rules

In the case of a minor or incompetent plaintiff, the term "federally required commencement date" means the later of the date referred to in subparagraph (A) or the following:

(i) In the case of a minor, the date on which the minor reaches the age of majority, as determined by State law, or has a legal representative appointed.

(ii) In the case of an incompetent individual, the date on which such individual becomes competent or has had a legal representative appointed.

STATE WRONGFUL DEATH STATUTES

Alabama	Ala. Code §§ 6-5-410 (1975)
Alaska	Alaska Stat. § 09.55.580
Arizona	Ariz. Rev. Stat. §§ 12-611 (1994 and Supp. 2001) *et seq.*
Arkansas	Ark. Code Ann. §§ 16-62-101 to 102 (Michie 1987 & Michie Supp. 1999
California	Cal. Civ. Proc. Code § 377.60 (West Supp. 2002)
Colorado	Colo. Rev. Stat. § 13-21-201 and 202
Connecticut	Conn. General Statutes § 52-555
Delaware	10 Del. C § 3724
District of Columbia	D.C. Code § 16-2701 (1997 Repl. Vol.)
Florida	Section 768.16-768.27, Fla. Stat. (1997)
Georgia	O.C.G.A. §§ 51-4-1 *et seq.* (1982)
Hawaii	Haw. Rev. Stat. § 663-7
Idaho	Idaho Code § 5-311 (1998)
Illinois	740 ILCS 180/0.01 *et seq.* (1999); 755 ILCS 5/27-6 (1999)

Indiana	Ind. Code § 34-23-1-1 (1998)
Iowa	Iowa Code § 611.20 (1999)
Kansas	Kan. Stat. Ann. § 60-1901 (1994 & Supp. 2000)
Kentucky	Ky. Const. Sect. 14, 54, 151; Ky. Rev. Stat. Ann §§ 411.130, 411.133, 411.135, 411.140, 411.145
Louisiana	La. Civ. Code Ann. arts. 2350.1, 2350.2
Maine	Me. Rev. Stat. Ann. tit. 18-A § 2-804 (1998 & Supp. 2001)
Maryland	Md. Code Ann., Cts. & Jud. Proc. §§ 3-901 to 3-904
Massachusetts	Mass. Gen. Laws ch. 229, § 2
Michigan	Mich. Comp. Laws § 600-2922
Minnesota	Minn. Stat. § 573-02
Mississippi	Mississippi Code Ann. Section 11-7-13
Missouri	Mo. Rev. Stat. §§ 537-080-537.100 (1994)
Montana	Mont. Code. Ann. § 27-1-513
Nebraska	Neb. Rev. Stat. § 30-809 (1995)
Nevada	Nev. Rev. Stat. § 41.085

New Hampshire	N.H. Rev. Stat. Ann. § 556:1, *et seq.* (Supp. 1999)
New Jersey	N.J.S.A. 2A:31-1, 4, 5
New Mexico	N.M. Stat. Ann. 1978, § 41-2-3 (1939)
New York	N.Y. E.P.T.L. §§ 5-4.1 *et seq.* (1999)
North Carolina	N.C. Gen. Stat. § 28A-18-2
North Dakota	N.D. Cent. Code § 32-21-01
Ohio	Ohio Rev. Code § 2125.01
Oklahoma	12 Okla. Stat. Ann. § 1051 and 1053 (2001)
Oregon	Or. Rev. Stat. §§ 30.020 to 30.070
Pennsylvania	42 Pa. Cons. Stat. Ann. § 8301
Rhode Island	R.I. Gen. Laws §§ 10-7-1 – 14 (1997)
South Carolina	S.C. Code Ann. § 15-51-10 *et seq.* (Law. Co.-op. 1976)
South Dakota	S.D. Codified Laws § 21-5-5 (1987)
Tennessee	Tenn. Code Ann. § 20-5-106 (Supp. 1999)
Texas	Tex. Civ. Prac. & Rem. Code § 16.003(b) (Vernon 2000)
Utah	Utah Code Ann. § 78-11-7 (1996)

Vermont	14 Vt. Stat. Ann. § 1492 (1999)
Virginia	Va. Code Ann, §§ 8.01-50 to -56 (Michie 1950)
Washington	Wash. Rev. Code §§ 4.20.010 & 4.20.020
West Virginia	W. Va. Code § 55-7-5 to 55-7-8a (2000)
Wisconsin	Wis. Stat. § 895.03 and 895.04
Wyoming	Wyo. Stat. §§ 1-38-101, *et seq.*

97th Congress
2d Session

COMMITTEE PRINT

INJURIES AND DAMAGES FROM HAZARDOUS WASTES –ANALYSIS AND IMPROVEMENT OF LEGAL REMEDIES

A REPORT TO CONGRESS IN COMPLIANCE WITH SECTION 301(e) OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (P.L. 96-510) BY THE "SUPERFUND SECTION 301(e) STUDY GROUP

PART 1
THE REPORT AND COMMENTS

September 1982

Printed for the use of the Senate committee on Environment and the Public Works

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON: 1982

Portions of *A Report To Congress In Compliance With Section 301(e) Of The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (P.L. 96-510) By The "Superfund Section 301(e) Study Group"*

Ninth Recommendation: Tier Two -- Plenary State Court Actions; Removal of Obstacles and Barriers to Effective Court Actions for Personal Injuries Resulting from Exposure to Hazardous Waste

The Study Group recommends that the several states enhance and develop common law and statutory remedies, and that they remove unreasonable *procedural* and other barriers to recovery in court action for personal injuries resulting from exposure to hazardous waste, including rules relating to the time of accrual of actions, joinder of parties, apportionment and proof of causation.

(a) Statutes of Limitations

A small number of states still follow the so-called traditional rule that the cause of action accrues from the time of exposure. Another small number of states has not as yet clearly adopted either the *traditional* or the discovery rule. Since many of the hazardous wastes are carcinogens, mutagens, teratogens or substances with delayed impact on different organs or the central nervous system, the latency period for the appearance of injury or disease is likely to be extended for thirty years or more. In states that have not clearly adopted the discovery rule (i.e., that the cause of action accrues from the time the plaintiff discovered or reasonably should have discovered the injury or disease) the cause of action will usually be time barred when the plaintiff discovers his hurt. The Study Group recommends that all states that have not already done so, clearly adopt the rule

that an action accrues when the plaintiff discovers or should have discovered the injury or disease and its cause. The Recommendation is intended also to cover the repeal of the statutes of repose which, in a number of states have the same effect as some statutes of limitations in barring plaintiff's claim before he knows that he has one.

Supreme Court, U.S.
FILED
MAR 11 2003
CLERK

No. 02-1036

In The

Supreme Court of the United States

WESTINGHOUSE ELECTRIC CORPORATION, *et al.*,

Petitioners,

v.

RAYMOND FREIER, individually, as Administrator of the Estate of Rose Freier, deceased, and as surviving spouse of Rose Freier, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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18 pp

QUESTIONS PRESENTED

The 1986 Superfund Amendments and Reauthorization Act ("SARA") amendments to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") include a provision, 42 U.S.C. § 9658, that establishes a federal accrual date for certain actions "brought under State law for personal injury, or property damages." The federal accrual date is defined as "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned."

The questions presented are:

1) Whether Congress acted within its constitutional authority granted by the Commerce Clause, and also acted within the constraints of the Tenth Amendment, in enacting this federal accrual rule for state tort law claims.

2) Whether, on application of the above accrual rule, summary judgment is precluded by the existence of competing inferences from the record as to whether Plaintiffs knew or should have known of the cause of their injuries.

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STATEMENT OF THE CASE

Respondents Raymond Freier, *et al.* (the "Freier Respondents") are among 63 plaintiffs who have brought claims for themselves and their decedents, based on cancers they claim resulted from exposures to toxins released from the Pfohl Brothers Landfill ("the Landfill") in Cheektowaga, New York. For a complete statement of the case, the Freier Respondents refer the Court to the opinion of the court of appeals at Cert. App.1a-33a, and they incorporate that discussion herein.

The Freier Respondents filed their lawsuits between January 1995 and January 1997, after first being informed of a probable connection between the Landfill and their injuries in December 1994. That information came from the preliminary results of the Pfohl Environmental Health Study conducted by Drs. David Rigle and William Sawyer ("the Rigle-Sawyer Report"), which was an epidemiologic survey of residents who had lived, worked, or recreated near the Landfill. The preliminary results of the Rigle-Sawyer Report indicated that persons who frequented the immediate vicinity of the Landfill had an increased risk of developing a variety of cancers, when compared with other local residents who lived or worked farther from the Landfill. In response to learning those preliminary findings, the Freier Respondents filed their suits in small groups over the following months.

For years prior to the release of the preliminary results of the Rigle-Sawyer Report, the Landfill had received significant public attention. However, dozens of public reports reassured local residents that the Landfill had never posed any human health risk. The New York State Department of Health had conducted its own epidemiologic

survey, concluding that the Landfill posed no health risk. Prior to December 1994, these findings and other reassuring reports from state environmental and health authorities were conveyed through the local media and at public meetings. *See, e.g.*, Cert. App. 20a-29a.

The Petitioners in this case are a group of defendants that include both the owners and operators of the Landfill, as well as those who allegedly generated or transported toxic waste to the site. At the trial court, Petitioners sought summary judgment on the basis of the statute of limitations, asserting that the Freier Respondents' claims were time-barred under applicable New York limitations law. The Freier Respondents agreed that their claims would be barred under New York law, but they asserted that material questions of fact existed as to whether their claims were timely due to the application of the "federally required commencement date," or "FRCD," contained in the 1986 Superfund Amendments and Reauthorization Act ("SARA") amendments to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). The FRCD, codified at 42 U.S.C. § 9658, provides a federal accrual date for certain state law claims alleging injuries from the release of toxins at a "facility," as that term is defined in CERCLA.[1] The FRCD provides that such claims will accrue no earlier than the time that the "plaintiff knew (or reasonably should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned."

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[1] In this case, all parties acknowledge that the Landfill is a "facility" for purposes of the statute.

Petitioners challenged both the applicability and constitutionality of the FRCD. They also contended that, even if the FRCD survived constitutional scrutiny and applied to Plaintiffs' claims, those claims were nonetheless time-barred as a matter of law. According to Petitioners, the record supported only one possible conclusion – that the plaintiffs knew or reasonably should have known of the connection between the Landfill and their injuries prior to the end of 1991.

The trial court granted summary judgment despite agreeing with the Freier Respondents that the FRCD applied to their claims, and that the statute was constitutional. The trial court sided with Petitioners that Plaintiffs knew or reasonably should have known the connection between their injuries and the Landfill by no later than the end of 1991.

The court of appeals reversed, holding that material questions of fact exist as to when the Plaintiffs knew or reasonably should have known that the Landfill contributed to their injuries. The court also held that Congress acted within its authority under the Commerce Clause in enacting the FRCD, and that the statute's enactment did not improperly invade state sovereignty as protected by the Tenth Amendment. Petitioners then sought a writ of certiorari from this Court.

REASONS FOR DENYING THE WRIT

1. The Court of Appeals Correctly Determined That Congress Had Constitutional Authority to Enact the FRCD.

Contrary to Petitioner's contentions, Congress acted fully within its Commerce Clause authority in enacting the FRCD, and in no way overstepped the bounds of the Tenth Amendment.

a. The Commerce Clause

Congress has authority to enact a statute under the Commerce Clause if the statute "regulates activities that arise out of or are connected with a commercial transaction when the transaction and the activities, viewed in the aggregate, substantially affect interstate commerce." Cert. App. 44a (citing *Wickard v. Filburn*, 317 U.S. 111, 127-29 (1942)). Moreover, every piece of a statutory program that affects interstate commerce in the aggregate need not have its own substantial connection with commerce. "An individual provision will survive a Commerce Clause challenge if it is 'an integral part of the regulatory program[,] and . . . the regulatory scheme when considered as a whole' can be shown to be 'independently and directly related to a valid congressional goal.'" Cert. App. 44a-45a (quoting *Hodel v. Indiana*, 452 U.S. 314, 329 n.17 (1981) (bracket and ellipsis in original)).

In this case, the FRCD both has its own substantial connection with interstate commerce, *and* it is an integral part of CERCLA as a whole.

As an initial matter, the FRCD has an independent impact on commerce sufficient to bring it within Congress'

Commerce Clause powers. Because claim accrual rules often determine whether a defendant may be liable in a toxic tort case, such rules can and do have a substantial impact on interstate commerce. The legislative history of the SARA amendments to CERCLA confirm the commercial impact of claim accrual rules in the toxic tort setting. In originally enacting CERCLA, Congress created a "Section 301(e) Study Group," assigning the group the responsibility of "determin[ing] the adequacy of existing common law and statutory remedies in providing legal redress for harm to man and the environment caused by the release of hazardous substances into the environment." 42 U.S.C. § 9651(e). The group's report, issued in September 1982, eventually served as one basis for Congress' adoption of the FRCD as part of the SARA amendments.

The Section 301(e) Study Group determined that statutes of limitation posed a "major barrier" to recovery in toxic injury claims. The Group thus recommended adoption of the "discovery rule" for determining accrual of toxic injury claims, both by states for tort lawsuits and by the federal government, for purposes of an administrative claims program to compensate those alleging toxic injuries. The Group recommended creation of such an administrative claims program, which would make payments from a fund to be created as a result of a tax on industries that create toxic waste. Despite misgivings from certain members of the Study Group regarding imposition of such an industry tax, the Group as a whole believed the tax was justified due to the economic burdens created by industry pollution: "[a]s a general principle, the economic cost of injury should be carried by the industry or enterprise that creates them, because efforts to reduce the cost will result

in greater care and more safety and protection of the public." "A Report to Congress in Compliance with Section 301(e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 by the 'Superfund Section 301(e) Study Group,'" (hereinafter "Study Group Report"), September 1982 at 248.[2] The Study Group Report thus confirms the commercial impact of claim accrual rules, which help allocate the economic costs of pollution to industry by determining whether injury claims will go forward.

The court of appeals below also found that application of the FRCD creates greater incentives to clean up hazardous waste sites, by making it more likely that a company that fails to do so will face liability. Cert. App. 49a-50a. But in addition to these conduct incentives created by the FRCD, its greatest commercial impact comes from Congress' overarching policy decision that industry, rather than exposed victims, should bear the costs of toxic injuries. Such injuries burden our citizens and health care system, and Petitioners cannot seriously question that this economic burden has a substantial impact on interstate commerce. Clearly the Commerce Clause grants Congress the power to allocate to industry the ultimate liability for creation of that economic cost. As the Study Group Report confirms, the FRCD was created as part of such an allocative decision.

Apart from the FRCD's independent impact on commerce, it also survives Commerce Clause scrutiny because

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[2] The full text of the Study Group Report is available on Westlaw as "A&P SARA Comm. Print 1982," in the "SARA-LH" database.

it is an integral part of CERCLA as a whole. Petitioners admit that CERCLA, which creates a broad regulatory program for dealing with hazardous waste sites, has a substantial effect on commerce. Petitioners nonetheless contend that the FRCD fails Commerce Clause scrutiny because it is not an integral part of CERCLA. Pet. at 8-9. However, the history of CERCLA and the FRCD belie this argument.

By creating the Section 301(e) Study Group, Congress expressly indicated the importance to CERCLA of "the adequacy of existing common law and statutory remedies in providing legal redress for harm to man and the environment caused by the release of hazardous substances into the environment." 42 U.S.C. § 9651(e). CERCLA provides a regulatory framework for cleanup of hazardous waste sites and allocation of the costs associated with such cleanup efforts. Although the statute does not create tort remedies for harms caused by those same hazardous waste sites, the very fact that Congress included Section 301(e) in CERCLA provides clear indication that such remedial concerns were integral to Congress' overall purposes. Indeed, that provision specifically directs the Study Group to address the barriers to recovery posed by statutes of limitations. 42 U.S.C. § 9651(e)(3)(F). Moreover, when the Study Group returned its findings in 1982, Congress quickly acted on the Group's recommendations by creating the FRCD as part of the 1983 SARA amendments. Although the Group had not recommended the FRCD as such, it had clearly recommended that both state and federal authorities adopt the discovery rule for dealing with claims arising from toxic exposures. *See, e.g.*, Study Group Report at 246 ("The Study Group recommends that the 'discovery rule' apply to all claims and that claims not

be time-barred by reason of the passage of time from exposure or injury to the discovery of the illness or injury on which the claim is based . . .").

If the FRCD were not "integral" to CERCLA, Congress would have not chosen to include section 301(e) in the original statute, or it would have ignored the subsequent recommendation of the Group to adopt the discovery rule. Instead, Congress both requested a recommendation and followed it.

b. The Tenth Amendment

Congress did not violate state sovereignty by enacting the FRCD. Unlike the statute at issue in *Printz v. United States*, 521 U.S. 898 (1997), the FRCD in no way "commandeers" state officers or agents to implement a federal regulatory scheme. To the contrary, the FRCD imposes no obligation on any state officials other than judges, who, as a result of the Supremacy Clause, must often enforce federal prescriptions. *Printz*, 521 U.S. at 907; Cert. App. at 52a (citing *New York v. United States*, 505 U.S.144, 178-79 (1992)).

Petitioners' contention that enactment of the FRCD "commandeers" the state legislative process is wrong. *See* Pet. at 11-15. The FRCD neither requires nor requests state legislatures to take any action. Its implementation does not depend in any way upon state legislative action. Petitioners' argument boils to a contention that, any time federal law trumps otherwise applicable state law, Congress has effectively "commandeered" state legislatures. If accepted, such an argument would empty the Supremacy Clause of meaning, and strip Congress of its power.

The fact that the FRCD must be applied in connection with state laws that Congress chose not to usurp does not mean that the FRCD tramples states' rights. Petitioners essentially argue that the FRCD violates the Tenth Amendment because Congress chose to tread on state sovereignty less heavily than the Commerce Clause would have permitted. But the mere fact that, in enacting the FRCD, Congress chose not to interfere with states' decisions regarding provision of toxic tort remedies and the length of limitations periods does not mean that creation of the FRCD is invalid. Such counter-intuitive reasoning provides no grounds for this Court to grant certiorari.

Finally, the Freier Respondents note that the constitutional issues raised here have been unanimously resolved by the six lower court judges to have addressed them. In this case, the magistrate judge, the district court judge, and the three court of appeals judges all agreed that the FRCD did not violate the Constitution. And they all agreed with the district court judge in *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692 (D. Kan. 1991). Although these constitutional issues are admittedly important, the unanimity of the lower courts with respect to these issues demonstrates that they are not of such difficulty to create a need for this Court to address them.

2. This Court's Decision in *Jinks v. Richland County* Will Not Dictate the Outcome in this Case.

The Freier Respondents respectfully disagree with their co-Respondent, the United States of America, to the extent the United States suggests that this Court should hold the petition for certiorari pending its decision in

Jinks v. Richland County, No. 02-258 (U.S., argued March 5, 2003).

Whatever the outcome in *Jinks*, that decision will not control this case. The constitutional issue in *Jinks* is sharply distinct from the issues here for two reasons: 1) Congress passed the statute at issue in *Jinks*, 28 U.S.C. § 1367(d), under its Article III authority to develop procedures for the federal courts, rather than under the Commerce Clause; and 2) the arguments in *Jinks* center around the thorny sovereignty problem of immunity for state political subdivisions – an issue nowhere raised in this case.

Because the constitutional issues in *Jinks* raise different legal concerns than the constitutional issues here, this Court should not hold the petition for certiorari. The heart of the issue here is whether Congress acted within its Commerce Clause authority in creating the FRCD, and *Jinks* cannot affect that analysis. The Tenth Amendment issues raised in both cases, though factually similar in the sense that both involve federal provisions that act to toll state limitations periods, are nonetheless quite different legally because of the sovereign immunity question raised in *Jinks*. Indeed, this Court could inadvertently misdirect the result here if it chose to intertwine this case with *Jinks* by holding this petition now, and later granting, vacating, and remanding this case to the court of appeals for further consideration in light of the *Jinks* decision. Such a result would signal the court of appeals to rest its decision here on the analysis in *Jinks*, despite the fact that the *Jinks* analysis will likely have little or no overlap with the issues in this case. For these reasons, this Court should deny the petition for certiorari now, rather than holding the petition for *Jinks*.

3. No Conflict Exists Within the Circuit Courts of Appeal Regarding the Proper Legal Standard for Application of the "Discovery Rule" for Accrual of Claims.

Petitioners' argument that there is a split among the circuit courts of appeal regarding the discovery rule is spurious. The court of appeals in this case applied the same legal formulation of the discovery rule as has been universally accepted by all of the circuit courts. That legal standard is familiar and straightforward: a claim does not accrue for purposes of the discovery rule until the plaintiff knew or reasonably should have known of her injury and its cause. *See* Cert. App. 54a; 42 U.S.C. § 9658(b)(4) (defining FRCD). Petitioners have failed to demonstrate that other courts of appeals would have or should have applied a different standard.

Petitioners seek to manufacture a circuit split by mischaracterizing the analysis of the court below as relying on "subjective factors" to delay accrual of the plaintiffs' claims. According to Petitioners, the court of appeals should not have considered evidence of public information (from official sources) tending to refute any causal connection between the Landfill and the plaintiffs' injuries. Such information, say the Petitioners, amounts to nothing more than "subjective excuses" for failing to file a timely claim. Finally, Petitioners claim that the courts of appeals have split on the issue of whether to consider such "subjective" factors in applying the discovery rule. *See* Cert. Pet. at 20-25. But Petitioners' strained analysis does not wash. The court below did not consider "subjective" factors in applying the objective legal standard called for by the discovery rule, but instead applied a well-accepted

formulation for both claim accrual and for review of a grant of summary judgment.

The court of appeals determined that a material question of fact exists as to when Plaintiffs' claims arose on the basis of evidence that went to the *objective* question of whether a reasonable person should have known of the relationship between Plaintiffs' injuries and the Landfill. Because public health and environmental authorities repeatedly issued public statements reassuring local residents that the Landfill posed no health threat, the court of appeals determined that it was inappropriate for the trial court to conclude, *as a matter of law*, that Plaintiffs' claims accrued while such reassuring statements were being made. *See* Cert. App. 57a-62a. In so holding, the court of appeals merely applied the black-letter rule that, when assessing a motion for summary judgment, "the court is required to view the factual record in the light most favorable to the party against whom summary judgment is sought and to draw all factual inferences in favor of that party." Cert. App. 57a (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam)). The court of appeals determined that the evidence of reassuring public statements was relevant to the issue of what a reasonable person should have known – given the available information – about the causal connection between the Landfill and plaintiffs' injuries.[3] Nothing in

[3] Petitioners further demonstrate a fundamental misunderstanding of the difference between an objective and subjective test by arguing that the court of appeals should have considered the fact that the plaintiffs failed to show that they had actually read and relied upon the reassuring statements issued by government officials. *See* Pet. at 17;

(Continued on following page)

this approach conflicts with either the approach of other circuit courts of appeal or this Court.[4]

The Freier Respondents also note that, of the circuit courts of appeals cases cited by Petitioners, only one involved application of the FRCD. *See* Pet. at 21-26 (listing and describing cases). That case, *O'Connor v. Boeing North American, Inc.*, 311 F.3d 1139 (9th Cir. 2002), reached the same result as the court below reached here, based on essentially the same reasoning. Like this case, *O'Connor* involved difficult issues of science and conflicting available information regarding a causal link between toxic exposures and the plaintiffs' injuries. *See O'Connor*, 311 F.3d at 1150-51 ("whether Plaintiffs knew or should have known that the contamination from the Rocketdyne facilities

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29. Such information is irrelevant to the objective determination of whether, if plaintiffs had conducted a reasonably diligent investigation of the cause of their injuries, such an investigation would have revealed that cause. In other words, plaintiffs' claims will not be time-barred by their subjective failure to exercise reasonable diligence, if even a reasonably diligent plaintiff would still not have discovered the cause of their injuries. *See, e.g., Hobson v. Wilson*, 737 F.2d 1, 35 & n.107 (D.C. Cir. 1984) (the plaintiff "is held to be on notice of all facts he could have learned through reasonably diligent inquiry.") The court of appeals found that a material question of fact exists with respect to that objective question of what a reasonably diligent plaintiff would have discovered under these circumstances.

[4] Petitioners consistently suggest that the court of appeals determined that the reassuring government reports "delay," "extend," or "toll" accrual of plaintiffs' claims. This is wrong. Instead, the court of appeals merely determined that the *factfinder* must decide when the claim accrued, based on the relevant information available to a reasonably diligent plaintiff. Merely because the court of appeals found that there was evidence sufficient to create an issue of fact does *not* mean the court determined that plaintiffs' claims had not accrued at the time Petitioners claim.

caused their injuries depends on whether a reasonable person would have inquired about the cause of his injury in light of public knowledge about the causes of cancer and other latent diseases, including publicity about the release of hazardous substance from the Rocketdyne facilities as well as other potential causes"). The remaining cases cited by Petitioners all interpret other statutory provisions and involve dissimilar facts. Again, Petitioners have failed to demonstrate the existence of a conflict.

CONCLUSION

The Freier Respondents respectfully pray this Court deny the petition for certiorari.

Respectfully submitted,

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Supreme Court, U.S.
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No. 02-1036

In the Supreme Court of the United States

WESTINGHOUSE ELECTRIC CORPORATION, ET AL.,
PETITIONERS

v.

RAYMOND FREIER, INDIVIDUALLY, AS ADMINISTRATOR OF THE ESTATE OF ROSE FREIER, DECEASED, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

The brief for the United States will address the following questions:

1. Whether 42 U.S.C. 9658, which preempts contrary state laws regarding the commencement of limitations periods in certain state-law tort actions involving hazardous substances, is a permissible exercise of congressional authority under the Commerce Clause.

2. Whether Section 9658 violates the Tenth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-66a) is reported at 303 F.3d 176. The opinions of the district court (Pet. App. 67a-148a, 149a-199a) are reported at 26 F. Supp. 2d 512 and 68 F. Supp. 2d 236.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2002. A petition for rehearing was denied on October 8, 2002 (Pet. App. 210a). The petition for a writ of certiorari was filed on January 6, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, to "counteract the environmental threats associated with hazardous waste disposal." *United States* v. *Olin Corp.*, 107 F.3d 1506, 1508 (11th Cir. 1997). The regulatory scheme established by CERCLA addresses, *inter alia*, the cleanup of hazardous waste sites and the reimbursement of cleanup costs. See *Meghrig* v. *KFC Western, Inc.*, 516 U.S. 479, 483 (1996).

The CERCLA provision at issue in this case, 42 U.S.C. 9658, establishes a "federally required commencement date" (FRCD) for certain state-law tort actions to redress injuries caused by hazardous materials. Section 9658 was enacted in the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, § 203(a), 100 Stat. 1695. Section 9658(a)(1) provides:

> In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

42 U.S.C. 9658(a)(1). The term "federally required commencement date" is defined as "the date the plaintiff knew (or reasonably should have known) that the

personal injury or property damages referred to in [Section 9658(a)(1)] were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." 42 U.S.C. 9658(b)(4)(A). In cases where a covered state limitations period would begin to run before the date the plaintiff knew or reasonably should have known of his injury and its cause, the effect of Section 9658(a)(1) is to preempt state law and to require that the commencement date of the limitations period will be determined on the basis of the federal rule.

Section 9658 had its origins in the report of a study group that was convened pursuant to Section 301(e) of CERCLA, 42 U.S.C. 9651(e), and charged with "determin[ing] the adequacy of existing common law and statutory remedies in providing legal redress for harm to man and the environment caused by the release of hazardous substances into the environment." 42 U.S.C. 9651(e)(1). The study group was directed to consider, *inter alia*, "barriers to recovery posed by existing statutes of limitations." 42 U.S.C. 9651(e)(3)(F). The study group found that one of the primary obstacles to recovery under state laws was the commencement date for statutes of limitations:

> Commencement of the running of statutes of limitations can be a barrier to recovery under both common law and statutory remedies. This issue does not arise specifically from the applicable period of limitations which depends on the cause of action; the question is when the statute begins to run—the time when the action accrues. The plaintiff's ability to recover will often depend on whether a liberal discovery rule is applicable.

> Exposure to certain hazardous wastes may result in cancer, neurological damage, and in mutagenic and teratogenic changes. Most of these types of injuries have long latency periods, sometimes 20 years or longer. With long latency periods, a rule which starts the running of the statute from the time of exposure will defeat most actions before the plaintiff knows of his injury.

Superfund Section 301(e) Study Group, *Injuries and Damages from Hazardous Wastes-Analysis and Improvement of Legal Remedies, A Report to Congress in Compliance with Section 301(e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (P.L. 96-510)*, 97th Cong., 2d Sess. 43 (Comm. Print 1982) (Study Group Report). The study group endorsed a rule under which "an action accrues when the plaintiff discovers or should have discovered the injury or disease and its cause." *Id.* at 256.

When Congress adopted the FRCD provision in 1986, the Conference Committee explained that "[t]he study done pursuant to Section 301(e) of CERCLA by a distinguished panel of lawyers noted that certain State statutes deprive plaintiffs of their day in court. The study noted that the problem centers around when the statute of limitations begins to run rather than the number of years it runs." H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 261 (1986). The Conference Committee stated that Section 9658 "addresses the problem identified in the 301(e) study." *Ibid.*

2. The instant case arises out of tort suits filed under New York law for dozens of deaths and injuries allegedly caused by exposure to toxic substances released by the Pfohl Brothers Landfill, located near Buffalo, New York. Petitioners are alleged to have owned or oper-

ated the site, generated hazardous materials disposed of at the site, or transported hazardous materials to the site. See Pet. App. 7a-8a.

The district court, adopting the recommendations of the magistrate judge, held that the private respondents' claims were barred by the applicable statute of limitations. The court found that Section 9658 applies to survival and wrongful death claims, rejecting petitioners' contention that the statute's reference to actions for "personal injury" excluded suits based on the death of a person other than the plaintiff. The district court also rejected petitioners' arguments that the FRCD provision exceeds Congress's power under the Commerce Clause and that it violates the Tenth Amendment. The court found, however, that under the FRCD provision, the private respondents' claims accrued no later than the end of 1991 and were therefore barred by the applicable New York limitations period. See Pet. App. 11a-16a, 30a-33a.

3. The private respondents appealed, and petitioners cross- appealed, pressing (*inter alia*) their constitutional challenges to the FRCD provision. Pursuant to 28 U.S.C. 2403(a), the United States intervened in the court of appeals to defend the constitutionality of Section 9658. The court of appeals vacated the judgment of the district court and remanded for further proceedings. Pet. App. 1a-66a.

a. The court of appeals agreed with the district court that the FRCD provision applies to survival and wrongful death actions. Pet. App. 38a-43a.

b. The court of appeals held that Section 9658 is a valid exercise of congressional authority under the Commerce Clause. Pet. App. 43a-50a. The court explained that "the generation and disposal of waste material by companies in connection with the manu-

facture or processing of products is a business activity, and * * * the storage of such wastes by others is economic activity." *Id.* at 47a. The court further observed that "such wastes are commonly transported in interstate commerce," and that "even wholly intrastate disposal of hazardous wastes can threaten interstate and foreign commerce, as those wastes can contaminate streams that run through landfills and feed into tributaries of navigable waters." *Ibid.*

The court of appeals determined that the FRCD provision plays a significant role in achieving CERCLA's overall objectives. Thus, the court explained that "one of CERCLA's goals was to induce companies generating, transporting, dumping, and storing, etc., hazardous wastes voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites." Pet. App. 49a (internal quotation marks omitted). The court found it "plain that the FRCD provides such inducement." *Ibid.* The court explained that Section 9658

> gives companies responsible for hazardous wastes greater incentives to clean up the waste sites, for it exposes those companies to a longer period of liability for the harms those sites cause to human health and the environment. The longer the period of liability, the more likely it is that a responsible company will bear the expense of the harms it has caused. The greater the potential cost to the company, the greater the likelihood that the company will strive to avoid liability by taking appropriate remedial actions with respect to its hazardous waste sites. And the more remedial action that is undertaken voluntarily, the less the need for government intervention, and the cleaner the environment.

Id. at 49a-50a.

c. The court of appeals rejected petitioners' Tenth Amendment challenge to the FRCD provision. Pet. App. 50a-52a. The court observed that Section 9658 "does not conscript into federal service either the state's legislature or its executive branch," but "simply requires courts in which state-law toxic tort claims are asserted to recognize that such a claim did not accrue before the plaintiff knew or reasonably should have known the cause of the injury." *Id.* at 51a. The court found that requirement to be "squarely within Congress's long established powers under the Supremacy Clause of the Constitution." *Ibid.* The court explained that, "consistent with the Tenth Amendment, Congress may create federal causes of action that state courts are obligated to adjudicate. Or it may enact a federal law that preempts a state-law cause of action, thereby foreclosing state courts from entertaining such a state-law claim. Or Congress may, as it has done on occasion, simply extend a state limitations period." *Ibid.* (citations omitted). The court concluded that "[t]he FRCD, which requires no action by a state's legislative or executive officials, but only the application of federal law by the courts to recognize the Federal Commencement Date of a state-law claim, does not violate the Tenth Amendment." *Id.* at 52a.

d. The court of appeals held that the district court had erred in its application of the FRCD provision to the private respondents' claims. Pet. App. 52a-62a. The court held that the standard set forth in Section 9658 for determining when a state-law limitations period will commence, which focuses on when a plaintiff knew or reasonably should have known the cause of his injury, could not be satisfied by proof that by 1991 the private respondents should have had a "reasonable

suspicion" that their injuries had been caused by hazardous materials. *Id.* at 53a-54a. The court also held that the district court had failed to view the evidence in the light most favorable to the private respondents (the parties against whom summary judgment had been sought). *Id.* at 57a. The court of appeals therefore concluded that the district court's grant of summary judgment was improper because "the record did not permit the court to conclude that no reasonable fact-finder could fail to infer that [respondents] reasonably should have known prior to the end of 1991 that the Landfill was the cause of the injuries." *Id.* at 61a.

DISCUSSION

1. Relying principally on this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), petitioners contend (Pet. 5-9) that Section 9658 exceeds Congress's authority under the Commerce Clause. That argument lacks merit and does not warrant this Court's review.

a. In *Lopez*, this Court held that the Commerce Clause did not authorize Congress to enact a statute criminalizing the possession of a gun within 1000 feet of the grounds of a school. The Court explained that "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." 514 U.S. at 567. Similarly in *United States* v. *Morrison*, 529 U.S. 598 (2000), the Court held that Congress had exceeded its authority under the Commerce Clause when it created a private right of action for damages for victims of gender-motivated violence. The Court emphasized that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Id.* at 613.

CERCLA, by contrast, directly regulates economic activity. As the court of appeals observed, "the generation and disposal of waste material by companies in connection with the manufacture or processing of products is a business activity, and * * * the storage of such wastes by others is economic activity." Pet. App. 47a. CERCLA addresses the cleanup of contaminated sites and the allocation of costs associated with such sites, including costs of cleanup, damages to natural resources, and (through the FRCD provision) compensation for personal injuries and property damage. This Court has recognized that the disposal of hazardous waste is an activity in interstate commerce. See *Chemical Waste Mgmt., Inc.* v. *Hunt*, 504 U.S. 334, 337, 340 n.3 (1992) (noting that in 1992, only 16 States had commercial hazardous waste landfills); *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Res.*, 504 U.S. 353, 359 (1992) ("Solid waste, even if it has no value, is an article of commerce".). Compare *Hodel* v. *Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264, 275-283 (1981) (sustaining Surface Mining Control and Reclamation Act of 1977 under the Commerce Clause).

b. Petitioners do not question the constitutionality of the CERCLA provisions that govern on-site cleanup and cost-allocation. See Pet. App. 49a.[1] Rather, peti-

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[1] The lower federal courts have held that CERCLA's provisions governing on-site cleanup and the allocation of associated costs are valid exercises of Congress's authority under the Commerce Clause. See *Olin Corp.*, 107 F.3d at 1510-1511; *United States* v. *Glidden Co.*, 3 F. Supp. 2d 823, 840-843 (N.D. Ohio 1997), rev'd in part on other grounds, 204 F.3d 698 (6th Cir. 2000); *United States* v. *NL Indus.*, 936 F. Supp. 545, 556-563 (S.D. Ill. 1996); *Nova Chem., Inc.* v. *GAF Corp.*, 945 F. Supp. 1098, 1105-1106 (E.D. Tenn. 1996).

tioners focus on the FRCD provision alone and contend (Pet. 8-9) that it is not sufficiently related to interstate commerce to qualify as valid Commerce Clause legislation. As the court of appeals recognized, however, Section 9658 is "an integral part of [a] regulatory program" that, "when considered as a whole," is a permissible exercise of Congress's Commerce Clause authority. Pet. App. 45a (quoting *Hodel* v. *Indiana*, 452 U.S. 314, 329 n.17 (1981)). CERCLA includes provisions that establish emergency authority to remove hazardous substances and prevent health risks to those near a site, 42 U.S.C. 9604; create a national plan for responding to releases of hazardous substances, 42 U.S.C. 9605(a); establish authority to clean up contaminated sites, 42 U.S.C. 9606(a); and apportion liability for cleanup costs and natural resource damages, 42 U.S.C. 9607. By increasing the likelihood that persons harmed by hazardous materials will obtain compensation for their injuries, the FRCD provision furthers CERCLA's purpose of "'induc[ing]' companies generating, transporting, dumping and storing, etc., hazardous wastes 'voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites.'" Pet. App. 49a (quoting H.R. Rep. No. 1016, 96th Cong., 2d Sess. Pt. 1, at 17 (1980)). As the Study Group Report emphasized, "the economic cost of injury should be carried by the industry or enterprise that creates [it], because efforts to reduce the cost will result in greater care and more safety and protection of the public." Study Group Report 248.[2]

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[2] In enacting CERCLA, Congress had before it an abundance of evidence relating to the economic costs and harms associated with improper waste disposal. See generally *Olin Corp.*, 107 F.3d at 1511. Personal injuries and property damage are among those

Thus, by providing additional incentives for private remediation efforts, Section 9658 complements other CERCLA provisions intended to reduce the incidence of harms caused by hazardous materials. "The greater the potential cost to the company, the greater the likelihood that the company will strive to avoid liability by taking appropriate remedial actions with respect to its hazardous waste sites. And the more remedial action that is undertaken voluntarily, the less the need for government intervention, and the cleaner the environment." Pet. App. 49a-50a. Section 9658 also complements other CERCLA provisions intended to achieve an equitable apportionment of the costs that result from improper storage and disposal of hazardous substances.

Even considered in isolation, moreover, the FRCD provision bears a substantial nexus to interstate commerce and constitutes a valid exercise of Commerce Clause authority. Both as a general matter and in this case, improper disposal and storage of hazardous materials is typically the result of commercial activity. Compensation of persons injured by such practices is therefore an appropriate subject of federal concern. Acting pursuant to the Commerce Clause, Congress may regulate the manner in which injuries associated with such activities are redressed. Cf. *United States* v. *Kunzman*, 125 F.3d 1363, 1365 (10th Cir. 1997) (Congress may act pursuant to the Commerce Clause to

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costs. The potential harms are very substantial. At the time of the Study Group Report, there were between 431 and 2000 hazardous waste sites presenting a danger to human health. Study Group Report 22. In this case alone, plaintiffs seek to recover medical costs, lost wages, and other expenses associated with dozens of deaths and injuries.

reallocate costs associated with fraud in securities transactions), cert. denied, 523 U.S. 1053 (1998).[3]

c. Petitioners identify no decision that has held the FRCD provision to be unconstitutional. Absent a conflict in authority, petitioners' Commerce Clause challenge does not warrant this Court's review.

2. Petitioners contend (Pet. 10-17) that Section 9658 violates the Tenth Amendment by superseding the States' decisions regarding the time when the limitations periods for state-law causes of action will begin to run. Petitioners' Tenth Amendment claim lacks merit.[4]

a. Contrary to petitioners' contention (Pet. 11), Congress in enacting Section 9658 has not "commandeered" any State's "legislative process." Section 9658 does not require the enactment of any form of state legislation. Nor does its implementation require action by any state executive official. See Pet. App. 51a (noting that FRCD provision "does not conscript into federal service either the state's legislature or its executive branch"). Rather, "the FRCD simply requires *courts* in which state-law toxic tort claims are asserted to recognize that such a claim did not accrue before the plaintiff

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[3] Recognition of federal authority in this sphere presents no risk that "Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority." *Morrison*, 529 U.S. at 615. The FRCD provision addresses the narrow problem of injuries resulting from hazardous materials, and it operates in the context of a broader statutory scheme that heavily regulates hazardous substances.

[4] The court of appeals did not address the question, reserved by this Court in *Pierce County* v. *Guillen*, 123 S. Ct. 720, 732 n.10 (2003), whether private parties have standing to assert Tenth Amendment claims that are based on allegations that state prerogatives have been invaded.

knew or reasonably should have known the cause of the injury." *Ibid.* (emphasis added).

Even as applied to suits filed in state court, Section 9658 raises no serious Tenth Amendment concern. Congress's authority to preempt state law, and the concomitant obligation of state courts to apply valid federal law rather than inconsistent state law, are established features of our federal system. As this Court recognized in *New York* v. *United States*, 505 U.S. 144 (1992), federal "statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause." *Id.* at 178-179; see *Printz* v. *United States*, 521 U.S. 898, 907, 928-929 (1997); Pet. App. 52a.

Petitioners' Tenth Amendment challenge to Section 9658 is especially misguided in the instant case, which was filed in federal district court based on diversity of citizenship. See Pet. App. 77a, 163a. Implementation of the FRCD provision in this setting requires no action by any state official whatever. And petitioners have presented no argument that Congress is barred from enacting a federal accrual rule to govern state-law causes of action falling within the federal courts' diversity jurisdiction. Cf. *Hanna* v. *Plumer*, 380 U.S. 460, 469-472 (1965); *Sun Oil Co.* v. *Wortman*, 486 U.S. 717, 722, 726 (1988) (holding that the Full Faith and Credit Clause "does not bar application of the forum State's statute of limitations to claims that in their substance are and must be governed by the law of a different State," and explaining that "the society which adopted the Constitution did not regard statutes of limitations as substantive provisions, * * * but rather as procedural restrictions fashioned by each jurisdiction for its own courts").

b. This Court's decision in *Stewart* v. *Kahn*, 78 U.S. (11 Wall.) 493 (1870), establishes that Congress may, in appropriate circumstances, preempt the state rules that would otherwise govern the determination whether a state-law cause of action has been timely filed. The federal law at issue in *Stewart* was enacted in 1864 and provided that applicable limitations periods in civil and criminal cases would be tolled for the period during which the actions could not be prosecuted because of the Civil War. See *id.* at 494, 504-505. The case involved a contract action filed in Louisiana state court. *Id.* at 500-501. This Court first held that the statute applied to actions brought in state as well as federal courts. See *id.* at 505-506. The Court then rejected the argument that the law, so construed, exceeded Congress's authority under the Constitution. See *id.* at 506-507.

In sustaining the validity of the federal tolling provision, this Court observed that "Congress is authorized to make all laws necessary and proper to carry into effect the granted powers." 78 U.S. (11 Wall.) at 506. The Court concluded that Congress's war power "carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress. This act falls within the latter category. The power to pass it is necessarily implied from the powers to make war and suppress insurrections." *Id.* at 507. The Court rejected the defendant's contention that "as to matters not intrusted to the government of the United States, the State courts are considered as courts of another sovereignty. As Congress cannot create the State courts, as it cannot establish the ordinary rules of property, obligations, and contracts, * * * it cannot prescribe rules of proceeding for such State courts." *Id.*

at 498 (footnote omitted) (argument of counsel). The Court's decision in *Stewart* makes clear that Congress possesses constitutional authority to preempt the rules that would otherwise govern the timeliness of state-law causes of action, where such preemption is a "necessary and proper" means of carrying into effect Congress's enumerated powers.[5]

c. Because petitioners' Tenth Amendment challenge to Section 9658 lacks merit, and because no conflict in authority on this issue exists, plenary review by this Court is not warranted. A related question is currently pending before the Court, however, in *Jinks* v. *Richland County*, No. 02-258 (argued March 5, 2003). *Jinks* involves the application of the federal supplemental jurisdiction statute, 28 U.S.C. 1367. Section 1367(a) and (c) codify pre-existing judge-made rules and define the circumstances under which a federal court should exercise pendent jurisdiction over a state-law claim that is factually related to a federal cause of action. Section 1367(d) provides that, when a pendent state-law claim asserted under Section 1367(a) is dismissed by the federal court and subsequently refiled in state court, the applicable statute of limitations is tolled during the pendency of the federal action and for 30 days thereafter. In *Jinks*, the South Carolina Supreme Court held

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[5] CERCLA heavily regulates hazardous substances, and it makes parties who handle or dispose of such materials liable for cleanup costs irrespective of when that activity occurred. See *Olin Corp.*, 107 F.3d at 1511-1515; 42 U.S.C. 9613(g)(2) (establishing limitations periods for cost recovery actions that run from the time of the cleanup activity rather than the handling or disposal of hazardous substances). Persons who handle or dispose of hazardous substances therefore have a greatly reduced expectation of repose, lessening the interest of a State in enforcing a restrictive limitations period in private tort actions.

that Section 1367(d) is unconstitutional as applied to a state-law claim against a county defendant, on the ground that the federal statute impermissibly intrudes upon the State's authority to define the conditions upon which its political subdivisions will be subject to suit. See *Jinks* v. *Richland County*, 563 S.E.2d 104, 107-109 (S.C. 2002).

In addition to contending that Section 1367(d) is unconstitutional as applied to suits against a State's political subdivisions, the respondent in *Jinks* makes the broader argument that Section 1367(d) is invalid in all its applications, on the theory that "Congress' attempt to alter the application of a state law statute of limitations to be applied in state courts to state law claims represents an unconstitutional intrusion upon state sovereignty." 02-258 Resp. Br. at 17; see *id.* at 17-22. Although the FRCD provision addresses the commencement date of a state limitations period, rather than the rules that govern tolling of the limitations period once it has begun to run, each provision potentially requires a state-law cause of action to be treated as timely even though it would be time-barred as a matter of state law. This Court's decision in *Jinks* may therefore be relevant to the proper disposition of petitioners' Tenth Amendment challenge to CERCLA's FRCD provision. For that reason, the petition for certiorari in the instant case should be held pending the decision in *Jinks* and then disposed of as appropriate in light of that decision.[6]

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[6] The United States intervened in the court of appeals pursuant to 28 U.S.C. 2403(a) to defend the FRCD provision against petitioners' constitutional challenges. The government did not address any question concerning the proper application of Section 9658 to the facts of this case, and we take no position on those questions (see Pet. 17-30) in this Court.

CONCLUSION

With respect to the question whether 42 U.S.C. 9658 violates the Tenth Amendment, the petition for a writ of certiorari should be held pending this Court's decision in *Jinks* v. *Richland County*, No. 02-258 (argued March 5, 2003), and then disposed of as appropriate in light of that decision. With respect to the question whether Section 9658 exceeds Congress's authority under the Commerce Clause, the petition should be denied.

Respectfully submitted.

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NO. 02-1036

IN THE
SUPREME COURT OF THE UNITED STATES

WESTINGHOUSE ELECTRIC CORPORATION, *et al.*,

Petitioners,

v.

RAYMOND FREIER, individually, as Administrator of the Estate of Rose Freier, deceased, and as surviving spouse of Rose Freier, *et al.*,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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I. THE COMMERCE CLAUSE DOES NOT PERMIT FEDERAL REGULATION OF ACCRUAL RULES FOR STATE LAW TORT CLAIMS.

A. Respondents Fail To Explain How The FRCD Accrual Rule "Substantially Affects" Interstate Commerce.

The Respondents and the Second Circuit assign false attributes to the FRCD and use those false attributes as the foundation for their contention that the FRCD affects interstate commerce. The FRCD simply lacks these talismanic properties.

Despite assertions to the contrary, the FRCD does not "regulate the manner in which injuries associated with [hazardous waste] are redressed." U.S. Br. p. 11. The FRCD does not create tort liability or any tort cause of action, nor does it regulate the generation or disposal of hazardous waste, compensate for injuries resulting from the release of hazardous waste, allocate costs associated with hazardous waste, encourage or deter conduct of companies that deal with hazardous waste materials, or create any legal standard for conduct or damages.

Respondents contend that the "greatest commercial impact" of the FRCD is that it reflects Congress' desire to shift the costs of toxic torts to industry rather than exposed victims and yet admit that "in enacting the FRCD, Congress chose not to interfere with states' decisions regarding provision of toxic tort remedies . . . ." Br. in Opp. pp. 6, 9.

The FRCD is an accrual rule and nothing more. It federally determines when the limitations clock begins to run on certain state law toxic tort claims. Despite its inclusion in CERCLA, the FRCD does not apply to *any* claim arising under CERCLA. *See, e.g., Gussack Realty Co. v. Xerox Corp.*, 224 F.3d 85, 91 (2d Cir. 2000) ("CERCLA does not provide compensation to a private party for damages

resulting from contamination"). Indeed, the state law personal injury and property damage claims to which the FRCD applies need not have any connection with a CERCLA site. *See, e.g., Kowalski v. Goodyear Tire & Rubber Co.*, 841 F. Supp. 104, 107 (W.D.N.Y. 1994) ("there is nothing in the language of [the FRCD] that requires an underlying CERCLA action in order to apply the federally required commencement preemption of the state statute of limitations").

This Court made clear in *Lopez* that the regulated activity must *substantially* affect interstate commerce, and that a "mere effect" on commerce is not sufficient. *United States v. Lopez*, 514 U.S. 549, 559 (1995). In their failed effort to identify *any* commercial effect of the FRCD, Respondents ignore this applicable standard and do not even suggest that any effect they proffer is "substantial."

B. Respondents Fail To Explain How The FRCD Is Integral To CERCLA Or How Its Absence Would In Any Way Undercut CERCLA's Regulatory Scheme.

Respondents do not contend that the regulatory scheme of CERCLA would be undercut absent federal regulation of the accrual of state law personal injury claims. *Lopez*, 514 U.S. at 561. Without such a showing, the FRCD cannot be said to be an "integral" part of CERCLA. *Id.*

Nor is the FRCD "integral" to CERCLA merely because it grew out of a study commissioned by CERCLA. 42 U.S.C. 9651(e)(3)(F). The study group commissioned by Congress did not recommend enactment of the FRCD or anything resembling it. Moreover, Congress failed to follow each and every one of the study group's ten recommendations, including the ninth recommendation that in plenary state

court actions, *the states* amend their statutes of limitations to include the discovery rule.[1] Pet. App. H at 219a-220a.

The FRCD must stand or fall on its own merits and cannot ride the coattails of CERCLA. *See USA v. Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997). This Court should grant certiorari to define the scope of the Commerce Clause's reach.

II. THE TENTH AMENDMENT DOES NOT PERMIT CONGRESS TO CHANGE STATE LAW.

This Court has stressed that the allocation and balancing of federal and state powers is a serious issue that has given rise to many of this Court's most "difficult and celebrated cases." *New York v. United States*, 505 U.S. 144, 155 (1992). And, indeed, Respondents concede that the FRCD raises Tenth Amendment concerns, that these concerns are "important," and that in enacting the FRCD Congress "usurp[s]" state law and "tread[s] on state sovereignty." Br. in Opp. p. 9.[2]

Nonetheless, Respondents ignore the essential reason why the FRCD is unconstitutional under the Tenth

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[1] In 1982 when the study group report was released, many states did not have discovery rules of accrual. By 1986, when the FRCD was passed, however, most states, including New York, had adopted a discovery rule of accrual. *See* New York CPLR § 214-c (1986). Thus, the study group's concern that a personal injury claim might be stale before a plaintiff even knew he was ill had largely been alleviated by the states through state amendment of state accrual rules.

[2] The United States' suggestion that the Tenth Amendment concerns raised by the FRCD are not "serious," U.S. Br. p. 13, is like saying a statute can be a "little unconstitutional." Surely this is not the case.

Amendment. They offer only a myopic view of the effect of the FRCD, focusing only on whether the FRCD forces state governments to act and virtually ignoring the fact that the FRCD impermissibly ties the states' hands and prevents them from regulating the accrual of their state law claims.

The FRCD commandeers the state legislative process and *federally* changes state law. No action by a state executive or legislature is necessary or even possible. The state is "precluded from rejecting the role envisioned for [it] by the federal government" as the FRCD "strips [New York] of choice and control over state policy." *Koog v. United States*, 79 F.3d 452, 457 (5th Cir. 1996). New York is not free to opt out of the federal scheme, nor is it free to reject claims that fail to comply with state law.

Respondents' reliance on the Supremacy Clause and pre-emption puts the cart before the horse and underscores why this Court should grant certiorari to establish the bounds of federalism. Only those federal laws that are consistent with the Constitution's allocation of power between the state and federal governments are "supreme" and therefore may pre-empt contrary state laws. *Printz v. United States*, 521 U.S. 898, 924-25 (1997). Under Respondents' logic, the Tenth Amendment is rendered void and meaningless because every federal law would automatically pre-empt contrary state law by virtue of the Supremacy Clause.[3] Yet, the Supremacy Clause does not "trump" the Tenth Amendment.

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[3] Contrary to the United States' notion, Congress is not free to change state law in the guise of regulating diversity cases. U.S. Br. p. 13. The constitutionality of a statute is not determined by venue. In any event, the FRCD is not limited to diversity cases, and under the *Erie* doctrine (*Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)), statute of limitations are

(Footnote continued on next page)

Petitioners know of no instance, other than the FRCD, where Congress has usurped state accrual rules for state law claims.[4] Congress' avoidance of such a practice for over two hundred years "far outweigh[s]" any suggestion that it may do so now. *Cf. Printz*, 521 U.S. at 917-18.

Respondents also fail to address the Tenth Amendment concerns raised by the inclusion of wrongful death claims in the purview of the FRCD. As set forth in the Petition, the FRCD further changes state law and further violates the Tenth Amendment in this expansion.

Also unpersuasive is the United States' suggestion that this Court should excuse the FRCD's federal incursion into state law because toxic tort defendants should have "greatly reduced expectations of repose" and states should have a lessened interest in affording toxic tort defendants the same rights as other state law tort defendants. U.S. Br. p. 15 n.5. The notion that the Constitution can play favorites or that the Tenth Amendment is subject to the vagaries of popular opinion is dangerous and warrants this Court's review.

(Footnote continued from previous page)
"substantive" and therefore governed by state and not federal law. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988).

[4] Any reliance on *Stewart v. Kahn*, 78 U.S. 493 (1870), is misplaced. *Stewart* involved the federal tolling of limitations periods during the Civil War. The statute at issue did not change state accrual rules as the FRCD does. This Court did not address the Tenth Amendment in *Stewart*, but rather found the statute at issue to be a valid exercise of Congress' war powers. The FRCD cannot be similarly justified.

III. RESPONDENTS FAIL TO ADDRESS THE ISSUE BEFORE THE COURT INVOLVING THE ROLE OF SUBJECTIVE FACTORS IN A "DISCOVERY RULE" ANALYSIS.

Respondents have failed to show why the Court should deny certiorari on the accrual issue. Respondents merely reframe the "issue presented" to ask whether summary judgment is precluded if an issue of fact exists as to "knew or reasonably should have known." Br. in Opp. p. i.[5] This is not a proper question for review, as, by definition, it has only one answer – "yes." Respondents apparently fear that the Court's review of the question of law presented by Petitioners will not only result in certiorari, it will result in reversal of the Second Circuit's holding.

Despite Respondents' attempts at obfuscation, the issue before this court on review stands:

> Whether under th[e] objective discovery rule [of the FRCD], and in the absence of diligent investigation by plaintiffs, accrual may be postponed or tolled as long as there is information questioning causation?

As even Respondents acknowledge, the objective question under review is "what a reasonably diligent plaintiff would have discovered" regarding the cause of his injury given the amount of evidence readily available. Br. in Opp. pp. 12-13 n.3. Once the reviewing court finds sufficient evidence to establish (for summary judgment purposes) that plaintiff "knew or with reasonable diligence should have

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[5] Respondents frame the issue as follows: "Whether ... summary judgment is precluded by the existence of competing inferences from the record as to whether Plaintiffs knew or should have known of the cause of their injuries."

known" of the potential cause of his injury, that plaintiff is deemed to be on notice so as to start the limitations clock.

Respondents give lip service to the "objective" standard for the accrual analysis (Br. in Opp. p. 11; see also Pet. App. A at 39a-40a) yet they include subjective factors that they feel lay suspicions to rest or otherwise cause one to disregard evidence suggesting cause. "Some evidence" questioning causation does not, however, extend accrual. Once it is determined that sufficient evidence exists to place a plaintiff on notice of a potential cause of his injury, it is irrelevant whether (s)he is "lulled into complacency" as to bringing suit – the claim has already accrued.[6] The subjective "excuse" for why (s)he may have questioned causation or why (s)he waited to commence suit does not save the claims, and plaintiff delays at his or her own risk.

Under the Respondents' and Second Circuit's view of the FRCD, when a potential plaintiff reaches the fork in the road – having some knowledge of potential cause of his or her injury and some information questioning causation, (s)he is entitled to "stay put" without risking dismissal of his

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[6] Respondents fail to explain why "official reassurances" or information questioning causation raise a "genuine issue of material fact" to prevent summary judgment or why these "facts" should be considered under the accrual analysis to toll or delay the statute of limitations. If the DOH or the DEC had a duty to disclose to plaintiffs and failed in that duty, perhaps plaintiffs would have a claim against the agencies for negligence. For the reasons set forth in the Petition, however, third-party reassurances do not "excuse" plaintiff's delay in bringing suit.

claims as stale.[7] Under this view, a plaintiff's claims accrue as a matter of law only after (s)he has definitive "proof" of causation (which (s)he may never have).[8] The Second Circuit relies on what "gives plaintiffs no reason to know" (see Pet. App. A at p. 60a) rather than the readily available (and thus imputed) knowledge resulting from a diligent inquiry. This is not the law of accrual.

Moreover, Respondents persist in their argument, made to the court below, that one should impose a duty to disclose on third parties rather than a duty to inquire on plaintiffs. Respondents urge that their claims should not be time-barred "by their subjective failure to exercise reasonable diligence." Br. in Opp. pp. 12-13 n.3. Respondents cite no authority, however, for tolling the statute of limitations where they have admittedly failed in their duty of diligent inquiry. *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), cited in a footnote on page 13 of their brief, does not hold that a plaintiff may take advantage of equitable tolling or avail himself of the "discovery rule" in the absence of diligence. Unlike *Hobson,* this case does not raise the specter of fraudulent concealment. More importantly, Respondents have acknowledged they made no inquiry at all. Respondents' argument has been

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[7] This, of course, is completely hypothetical. As set forth below and in the Petition, Respondents admit they made no inquiry, thus never started down the road in the first place.

[8] Respondents make the strange concession that their claims "may have accrued" as early as 1991 and that the Second Circuit only "found there was evidence sufficient to create an issue of fact." Br. in Opp. p. 13 n.4. Under the Second Circuit's analysis, however, there will always be a question of fact absent definitive proof of causation. Respondents' concession highlights the effect of permitting substantive factors in an objective "discovery rule" analysis.

denounced by this Court and should be disregarded. *See Urie v. Thompson*, 337 U.S. 163, 170 (1949); *United States v. Kubrick*, 444 U.S. 111, 122-24 (1979) (restricting the application of the discovery rule to "blameless ignorance").

True, the Second Circuit's interpretation may give plaintiffs "greater access to the courts." Pet. App. A at 14a. The FRCD, however, already extends the time within which a plaintiff may commence suit. The Second Circuit accrual rule cannot be satisfied absent proof certain of causation, will never be satisfied as a matter of law, rewards the dilatory, and rewards weak causation cases. As such, this new rule disturbs the balance underlying statutes of repose.

Certiorari is warranted now to halt the further erosion and corruption of this important aspect of the law. Courts are already seizing on the Second Circuit's ruling in *Freier* and refusing to hold to an objective accrual analysis in latent injury cases. *See, e.g., Lessord v. General Electric Co.*, 2002 U.S. Dist. LEXIS 24839 (W.D.N.Y. Aug. 29, 2002) (applying FRCD to raise issue of fact as to accrual). As set forth in the Petition at pages 21-28, the split in the circuits as to the application of the "discovery rule" continues to confound the issue.

CONCLUSION

For the foregoing reasons as well as those set forth in the Petition, certiorari should be granted.

Respectfully submitted,

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